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1940.

JUDGES OF THE HIGH COURT.

JANUARY—JUNE, 1940.

Chief Justice.

The Hon'ble Sir Alfred Henry Lionel Leach, *Kt.* (*Barrister-at-Law*).

Puisne Judges.

The Hon'ble Justice Sir S. Burn, *Kt.*, I.C.S.
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THE

Madras Law Journal Reports

I] JANUARY [1940

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—LORD MACMILLAN, SIR GEORGE RANKIN AND MR. M. R. JAYAKAR.

Babu Bhagwan Din and others .. *Appellants**

v.

Gir Har Saroop and others .. *Respondents.*

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Babu Bhagwan Din *v.* Gir Har Saroop.

Res judicata—*Order by District Judge under Charitable and Religious Trusts Act (XIV of 1920), S. 3 directing respondents to furnish accounts and particulars relating to a temple alleged to be a public trust—Decision if final—Subsequent suit against respondents under S. 92 of Civil Procedure Code (V of 1908) and another suit by coparceners of respondents claiming temple as private property—If barred by* res judicata—*Temple—Dedication to public—Tests.*

Where an application is made to a District Judge under S. 3 of the Charitable and Religious Trusts Act, 1920, for an order directing accounts and other particulars to be furnished in respect of an institution, such as a temple, alleged by the applicant to be a public charity, and where the Judge holds that a *prima facie* case has been made out that the institution is in fact the subject of a public trust, and accordingly makes an order directing the furnishing of those accounts and other particulars, that decision so given by the Judge under the Act is a decision in a summary proceeding which is neither a suit nor of the same character as a suit, and there is no provision in the Act making it final; the doctrine of *res judicata* can, therefore, not be invoked by way of setting up that decision as a bar to a regular suit to determine the status of the institution even in the case of a person who was a party in making or resisting the application under the Act; and it is immaterial that the existence of a public trust is the foundation of the proceedings authorised by S. 3 of the Act, for, while the Judge may have to come to a decision on the question of status in order to satisfy himself on the question of his own jurisdiction, he cannot give himself jurisdiction by coming to an erroneous decision on the point in question.

*P. C. Appeal No. 79 of 1937. 10th October, 1939.
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Prem Nath v. *Har Ram*, A.I.R. 1934 Lah. 771 and *Haidaralli* v. *Gulam-mohiuddin*, (1934) I.L.R. 58 Bom. 623, approved and followed.

Opinion of Niamatulla, J., in *Mahadeo Bharthi* v. *Mahadeo Rai*, (1929) I.L.R. 51 All. 805, approved.

Observations by the Board on the principles of evidence to be applied in determining whether a temple has been dedicated to the public. *Pujari Lakshmana Goundan* v. *Subramania Aiyar*, (1923) 29 C.W.N. 112 (P.C.), distinguished.

Consolidated appeals from a decision of the Chief Court of Oudh dated 23rd October, 1934 (Nanavutty and Hasan, JJ.), on the one hand reversing a decision of the Subordinate Judge, Mohanlalganj, and on the other hand affirming a decision of the Subordinate Judge, Malihabad.

On 14th April, 1930, the appellants filed before the District Judge, Lucknow, under S. 3 of the Charitable and Religious Trusts Act, 1920, an application for an order directing accounts to be furnished in respect of a temple in Lucknow with the land adjoining, and the houses occupied with, it. The respondents to that application were five of the respondents to the present appeal all of whom claimed to be direct descendants of one, Daryao Gir, to whom a grant of the land in question had been made by the Nawab of Oudh in 1781. The application alleged no mismanagement of the temple, in the conduct of which no public interference had ever taken place. The five respondents to the application having refused an option given to them by the District Judge to bring an action for a declaration that the temple was not subject to a public trust, the Judge placed the burden on them of proving that fact and held that they had failed to discharge it. He accordingly made an order directing the furnishing of particulars relating to the property.

That order not having been complied with, the appellants in September, 1931, sued the same five respondents before the Subordinate Judge, Mohanlalganj, asking for their removal and for the appointment of new trustees. In December, 1931, fourteen plaintiffs brought an action in the Court of the Subordinate Judge of Malihabad for a declaration that they and four of the respondents to the application of April, 1930, were members of the joint Hindu family to whom the temple belonged. Judgment was given for the plaintiffs (that is, the present appellants) in the first suit, the Court holding that the decision of the District Judge on the application under S. 3 of the Act of 1920 concluded the matter in their favour. About a year later, the Judge in the second suit held that the temple was private property. On appeals against the two decisions, the Chief Court held that the temple was private, negativing the view of the Subordinate Judge in the first suit that the doctrine

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of *res judicata* applied as a result of the District Judge's decision on the application under the Act. Against that decision of the Chief Court, and the consequent decrees, the present appeals were brought. The facts are more fully stated in the judgment.

P. V. Subba Row for Appellants.—(Only the arguments relating to the question of *res judicata* are here recorded, the question of the status of the temple raising only issues of fact.) The effect of the proceedings taken by the appellants under S. 3 of the Act of 1920 is, it is submitted, to bar an action brought for a declaration that the temple is private, since the District Judge has, in adjudicating on the application, held that a strong *prima facie* case was made out by the appellants (the applicants before him) that the temple was subject to a public trust. The effect of the Act, taken as a whole, is to render this application final. The District Judge has had the evidence before him, has weighed it in his mind, and has come to a conclusion upon it, and there is no reason why that decision so arrived at should not be taken as final and binding against all comers, even those interested in the property who were not parties to the application. It cannot be right that, the matter having been investigated and adjudicated upon by a District Judge on an application of this kind, it should be open to another Court to reconsider the same matters, possibly arriving, as in the present case, at an exactly opposite conclusion.

T. B. W. Ramsay for Respondents.—The proceedings taken under S. 3 of the Act of 1920 are not and are not meant to be final. It is significant that the Act nowhere lays down that the decision of the District Judge on such an application is to be final, which would have been an obvious point to make clear had such been the intention of the legislature. Admittedly the application here relied upon as a bar is only one for an order directing an account to be furnished; but such an order will only be made on the basis that the temple is the subject of a public trust. The Judge hearing the application must therefore have had the whole question before him and have come to the conclusion as an integral part of his decision that the temple was subject to a public trust. Otherwise he would not have directed the furnishing of an account and other particulars at all. The question of the status of the temple is thus a matter which has necessarily been investigated and adjudicated upon on such an application, and it follows, it is submitted, that the application, though in form merely for an account, is such as to give rise to a case of *res judicata*.

The very nature of the proceedings on such an application is against their being final on so important a matter as the status of the institution in question, and it is no argument that the result of

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such an application should be held binding that a party to it may be unwilling to bring a suit to establish his title. Counsel referred to *Prem Nath* v. *Har Ram*[1] and *Haidaralli* v. *Gulammohiuddin*[2].

10th October, 1939. Their Lordships' judgment was delivered by

SIR GEORGE RANKIN.—On 14th April, 1930, the first two appellants (uncle and nephew) filed before the District Judge at Lucknow an application under S. 3 of the Charitable and Religious Trusts Act (XIV of 1920) for an order directing accounts to be furnished in respect of a certain temple in Lucknow together with land and houses adjacent thereto and occupied therewith. The principal deity is Bhaironji and from this idol the temple takes its name but there are other idols also in different parts of the temple compound, which is now of an area variously stated as about four *bighas* or 16 *biswas*. The respondents to the application were five in number, three men and two women: with certain other members of their family they are now respondents before the Board in this consolidated appeal. They claim to be direct descendants of one Daryao Gir to whom a grant was made in 1781 of the land now in question by the then reigning Nawab of Oudh. It has been found and it does not appear to be in doubt that the members of this family are *grihastha fakirs* being at once *goshains* and householders. The family comes from the Bijnore district "on the Dhampur side" and is a joint Hindu family of the usual type. At the time of the application to the District Judge members of the family had been continuously in occupation and control of the temple and a number of *samadhs* or tombs had been set up containing the ashes of *goshains* who had belonged to the family. No interference with the management of the temple or the conduct of its worship whether on behalf of the public or otherwise had at any time taken place. It was not alleged in the application that the family had been guilty of any neglect or mismanagement and the contrary has now been held by the Courts in India. The District Judge gave to the five respondents before him an option to bring a suit for a declaration that the property was not subject to a trust for a public purpose of a charitable or religious nature but they did not take this course. Accordingly he threw upon them the burden of disproving this

1. A.I.R. 1934 Lah. 771. 2. (1934) I.L.R. 58 Bom. 623.

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allegation and after hearing nine witnesses for the applicants and two of the respondent *goshains*, and after considering certain documents, he held that there was a strong *prima facie* case that the temple formed the subject of a public trust and that the *goshains* had failed to establish the opposite. He therefore directed the *goshains* before him to furnish particulars of the extent of the property, the nature of the buildings and the income for the past year (1st October, 1930). This order was not complied with, and on the 16th September, 1931, the first two appellants brought in the Court of the Subordinate Judge, Mohanlalganj, suit No. 108/7 of 1931 against the same five members of the respondents' family. The suit was framed under S. 92, Civil Procedure Code: relying upon the failure to furnish particulars as ordered by the District Judge, the plaint asked for removal of the defendants, the appointment of new trustees and the framing of a scheme for the management of the temple. Before judgment had been given in this suit, another suit—No. 8/130 of 1931—was on 23rd December, 1931, brought in the same Court by 14 plaintiffs, claiming that they and four of the persons impleaded as defendants were members of the joint Hindu family to whom the temple belonged. This meant that 13 persons who had not been made parties to the proceedings before the District Judge were now putting their rights in suit as descendants of Daryao Gir and his coparceners. The contesting defendants to this suit included the first two appellants—that is, the uncle and nephew who had initiated the proceedings before the District Judge. Judgment in the former of these suits (No. 108/7) was given on 22nd February, 1932, by the learned Subordinate Judge at Mohanlalganj. He held that the five *goshains*, defendants before him, had not proved that 13 other members of their family were interested and he left this to be determined in the other suit. He considered that the order of the District Judge concluded the question whether the temple was or was not the subject of a public religious trust and he decreed the suit, removing the five defendants, appointing new trustees and approving a scheme. About a year later (28th February, 1933) judgment in suit No. 8/130 of 1931 was delivered by another Subordinate Judge (at Malihabad) holding that the temple property was the private and personal property of the 18 persons (14 plaintiffs and four defendants) of the respondents' family on behalf of

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whom it had been claimed. Both of these decisions were taken on appeal to the Chief Court at Lucknow and on 23rd October, 1934, Nanavutty and Zia-ul-Hasan, JJ., delivered one judgment covering the two appeals. They held that the temple property was not impressed with a public trust but was private property belonging to the joint family of the *goshains*. Hence the two appeals, which are now before the Board as a consolidated appeal.

The first question is whether the order of the District Judge made under the Charitable and Religious Trusts Act, 1920, precludes the respondents from disputing that the temple is the subject of a public religious trust. That order was made in the presence of five members only of the family and it is not shown that the other members are bound by it according to any principle of representation. Hence it is difficult to see how these other members can be prevented from claiming the property as belonging to their joint family. The Chief Court have refused for other reasons also to regard the District Judge's order as conclusive. In this they have followed the decisions of a Bench of the Lahore High Court in *Prem Nath* v. *Har Ram*[1] and a single Judge of the Bombay High Court in *Haidaralli* v. *Saiyad Gulammohiuddin*[2] and have agreed with the view of Niamutulla, J., in *Mahadeo Bharthi* v. *Mahadeo Rai*[3] in preference to the opinion of Mukerji, J., in the case last mentioned. Their Lordships agree with the Chief Court. They hold that the decision of the District Judge under the Act of 1920—a decision from which by S. 12 there is no appeal—is a decision in a summary proceeding which is not a suit nor of the same character as a suit; that it has not been made final by any provision in the Act; and that the doctrine of *res judicata* does not apply so as to bar a regular suit even in the case of a person who was a party to the proceedings under the Act. The existence of a public trust is the foundation of the proceedings authorised by S. 3 of the Act: *prima facie* while the District Judge may have to come to a decision upon this point in order to satisfy himself on the question of his own jurisdiction, he cannot by an erroneous decision thereon give himself jurisdiction. To produce this result there must be some provision in

1. A.I.R. 1934 Lah. 771.
2. (1934) I.L.R. 58 Bom. 623.
3. (1929) I.L.R. 51 All 805.

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the Act which requires a contrary construction. No matter how long or how peaceably an individual may have been in possession and enjoyment of property it is always possible for persons claiming to be acting for the public to lay claim to the property as having been impressed with a trust of a charitable or religious nature. It is readily intelligible that the District Judge should be required to stay proceedings under the Act in any case in which the person against whom they have been taken is willing to bring a suit. But it would be both drastic and anomalous to provide that a person in possession, if not willing to bring a suit to establish his own title affirmatively, must be content to abide without right of appeal by the decision of the District Judge in a proceeding of this character. The terms of S. 6 of the Act are intended, in their Lordships' view, to define the consequences of such an order as was made in this case by the District Judge on 1st October, 1930, but the words "if a trustee without reasonable excuse fails to comply" cannot be read to exclude a contention in a regular suit that the plaintiff is not a trustee or to prevent a similar contention being raised by a defendant to a suit under S. 92 of the Code.

Upon the merits, it is desirable to consider first the documents. The main document of title has already been mentioned. It is exhibit No. 4 dated 2nd April, 1781, whereby the Nawab of Oudh granted the property now in question to the respondents' ancestor, Daryao Gir. The grant runs as follows:—

"The present and future state officials of Haveli Lucknow, suburbs and the province of Akhtarnagar Oudh, should know that five *pucca* bighas waste land, free from Government revenue, *mal* and *sewai*, in the immediate vicinity of village Nawagaon. included in the said Haveli whereon lies the house of Bhairōn, has been granted along with the said house, in the name of Daryao Gir Goshain the Mahant, free of all dues and shall not be shown in the record; that the said land shall, generation after generation and descent after descent, be left in the possession and enjoyment of the said person and his heirs and they (officials) should not interfere and meddle with the same for any reason so that the said person having remained in possession of the said land and constructed a house, etc., should with contentment and devotion remain engaged in praying for His Highness."

This grant was construed by a Court of the Nawab in 1843 when members of the respondents' family took proceedings to eject certain *dhobis* (washermen) who had been allowed to set up and live in a thatched hut in the courtyard of the temple. It was held to be a grant of five bighas of the waste land to Daryao Gir, ancestor of the "*fakirs*", to be held genera-

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tion after generation as a *muafi* (revenue free grant) and that the "*fakirs*" had been long in possession. There is also the *Khasra* compiled after 1857 at the time of the first Settlement of the city of Lucknow soon after the annexation of Oudh by the British. This shows the plot as "mud house of Bhaironji" and under the heading "name of owner by virtue of possession" are inserted "Kesri Gir and Jawahir Gir and Kalyan Gir disciples of Daryao Gir". These are the main documents in the case but there are in addition a number of "sarkhats", or leases of shop rooms on the outskirts of the temple property. These are expressed to be granted by individual members of the respondents' family: as the Trial Judge (in suit No. 8/130) has pointed out, the lessors were representative of each of the three branches of the family. The Chief Court noticed that there is no lease in the name of the idol as distinct from the names of individual *goshains*. In these leases the *goshains* are sometimes referred to as "owners" of the shop or *kothri*: in one at least, as owners of the "*asthan Sri Bhaironji*".

It will be convenient to indicate the main features of the evidence before attempting to draw any inferences from the documents. The appellants rely strongly on the fact that for many years Hindu members of the public have resorted to the temple for worship and *darshan* without let or hindrance. About 46 years before the trial, a *mela* or fair had been started by some musicians and dancers and had become an annual function towards which public subscriptions were collected. There was some evidence that part of these monies had been spent upon whitewashing and repairing the temple but the Chief Court does not consider this to be established; though it is certain that the temple and its *goshains* profited from the increased resort to the temple during the *mela*.

The appellants maintain that upon a review of the history of the temple they have established that it was held out to the public as a public temple and that the Courts in India should have applied to it the reasoning of the Board in the Madras case of *Pujari Lakshmana Goundan* v. *Subramania Aiyar*[1]. The facts which have been held by the Courts below to tell in favour of the respondents are that there had been no previous interference with the temple on behalf of the public; that the *goshains*

1. (1923) 29 C. W. N. 112 (P. C.).

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took the offerings for themselves; that they divided them according to their shares as members of different branches of the family; that they spent money on repairs; that they gave leases in their individual names and not in the name of the idol; that they closed the temple when they had occasion to go to their native village for family ceremonies, for example, marriages; and that tombs to certain members of the family were put up though they could not claim to be famous saints.

Their Lordships agree with the Chief Court in holding that the grant of 1781 is not a grant to the idol or an endowment of a temple or a gift made by way of trust for a public religious purpose. The grant is to Daryao Gir and his heirs in perpetuity. Had it been intended as an endowment for an idol it would have been very differently expressed: the reference to the grantee's heirs, and the Arabic terminology *"naslan ba'da naslin wa batnan ba'da bainin"* (descendant after descendant and generation after generation) are not reconcileable with the view that the grantor was in effect making a wakf for a Hindu religious purpose, even if it be assumed that this is not otherwise an untenable hypothesis. While it is true that the origin of the idol is not completely traced—the respondents' allegation that it was founded or set up by Kishore Gir, father of the grantee, not being established by evidence—the grant of 1781 discloses the existence of a fakir with an idol in a mud hut squatting upon waste land which did not belong to him and which was given to him for the first time by the grant. It would, in their Lordships' opinion, be an error in method if the subsequent history of the little temple was not looked at in the light of this grant. While it is certainly possible that in the course of years the temple should have been so dealt with as to become dedicated for the benefit of the Hindu public as a public temple, such a dedication requires to be proved. Their Lordships consider that in suit No. 8/130, the Courts in India have followed a proper method and arrived at a correct conclusion upon the point. The decision of 1843 shows the position to have then been as in 1781 and the *khasra* at the time of the Settlement of Lucknow shows no variation—there is still a mud hut with an idol in it and the "owners" are members of the respondents' family, though described as "disciples of Daryao Gir". The general effect of the evidence is that the family have treated the temple as family property, dividing the various

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forms of profit whether offerings or rents, closing it so as to exclude the public from worship when marriage or other ceremonies required the attendance of the members of the family at its original home, and erecting *samadhs* to the honour of its dead. In these circumstances it is not enough, in their Lordships' opinion, to deprive the family of their private property to show that Hindus willing to worship have never been turned away or even that the deity has acquired considerable popularity among Hindus of the locality or among persons resorting to the annual *mela.* Worshippers are naturally welcome at a temple because of the offerings they bring and the repute they give to the idol: they do not have to be turned away on pain of forfeiture of the temple property as having become property belonging to a public trust. Facts and circumstances, in order to be accepted as sufficient proof of dedication of a temple as a public temple, must be considered in their historical setting in such a case as the present; and dedication to the public is not to be readily inferred when it is known that the temple property was acquired by grant to an individual or family. Such an inference if made from the fact of user by the public is hazardous, since it would not in general be consonant with Hindu sentiments or practice that worshippers should be turned away; and as worship generally implies offerings of some kind it is not to be expected that the managers of a private temple should in all circumstances desire to discourage popularity. Thus in *Mundancheri Koman* v. *Achuthan Nair*[1] the Board expressed itself as being slow to act on the mere fact of the public having been freely admitted to a temple. The value of public user as evidence of dedication depends on the circumstances which give strength to the inference that the user was as of right. Their Lordships do not consider that the case before them is in general outline the same as the case of the Madras temple, *Pujari Lakshmana Goundan* v. *Subramania Aiyar*[2], in which it was held that the founder who had enlarged the house in which the idol had been installed by him, constructed circular roads for processions, built a rest house in the village for worshippers, and so forth, had held out and represented to the Hindu public that it was a public temple. The Chief Court have, in the opinion of the Board, correctly

2. (1934) 67 M.L.J. 788: L.R. 61 I.A. 405: I.L.R. 58 Mad. 91 (P.C.).
2. (1923) 29 C.W.N. 112 (P.C.).

estimated the particular facts of the case before them and have rightly negatived the contentions that the temple is a public temple and that the property in suit is impressed with a trust of a public religious character.

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Their Lordships will humbly advise His Majesty that this consolidated appeal should be dismissed. The appellants must pay the respondents' costs.

Solicitors for Appellants: *Hy. S. L. Polak & Co.*

Solicitors for Respondents: *James Gray & Son.*

R. C. C.

K.S. —— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE PATANJALI SASTRI.

Muthuswami Chettiar and others .. *Petitioners (13th, 14th and 15th Counter-Petitioners).*

F B.

Muthuswami Chettiar, *In re.*

Criminal Procedure Code (V of 1898), S. 107—Notice under—Nature of —Breach of peace—Contemplation of—Notice must set out information of breach—Case for inquiry to be disclosed in notice.

On the question referred to the Full Bench, namely, whether a notice under S. 107 of the Criminal Procedure Code, stating that the petitioner was a leader of one of the rival factions in a village, that the feelings between the factions were strained, that there was a likelihood of a breach of peace in the village and that the petitioner was giving active support to the members of his faction to further their nefarious activities, which activities were known to the petitioner as evidenced by the affidavit filed by the petitioner, was one relating to a wrongful act in contemplation and was in the circumstances justifying a Magistrate to demand of the petitioner the security bond for keeping the peace,

Held, that the substance of the information received by the Magistrate had set out a case for inquiry under S. 107. The notice complied with the requirements of S. 107 and hence no ground for the petitioner existed to apply for revision to the High Court.

The notice under S. 107 is merely a preliminary step and no order can be passed under S. 107 unless the inquiry, which follows, under Ss. 112, etc., the issue of notice shows that the laying of the information was justified. The High Court can always interfere when the inquiry has not been held in accordance with the law or a wrong conclusion is arrived at.

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*Crl. R. C. Nos. 245, 246, 298 and 340 of 1939 19th September, 1939.
(Crl. R. Ps. Nos. 226, 227, 276 and 316 of 1939).

F.B.

Muthu-swami Chettiar, *In re.*

High Court Proceedings No. 1952 (29th August, 1876), (1876) 2 Weir 49; *Nagi Reddi Konda Reddi* v. *King-Emperor*, (1917) I. L R. 41 Mad. 246; *Maruthapalli Gounder* v. *Emperor*, (1937) M.W.N. 48; *Kumarappa Chettiar* v. *Emperor*, (1937) M.W.N. 1072 and *Jaguji Rai* v. *Emperor*, (1918) 16 A.L.J. 567, referred to.

Petitions under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Pollachi dated 22nd February, 1939 and made in M. C. No. 63 of 1938, etc.

K. S. Jayarama Aiyar, N. Shanker Bhat, G. Gopalaswami, S. R. Subramaniam and *N. Somasundaram* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

These petitions coming on for hearing before the Hon'ble Mr. Justice Patanjali Sastri, the Court made the following

ORDER OF REFERENCE TO FULL BENCH.*

These Criminal Revision Cases raise an important question as to the construction and scope of S. 107 of the Code of Criminal Procedure. On the one hand, it is argued for the petitioners that the information and the evidence on which a Magistrate can act under this section must relate to a breach of the peace or wrongful act *in contemplation* at the time when such information is given to the Magistrate, and that any wider construction of the provision might have the effect of turning the section into a weapon of oppression in the hands of the Magistracy. On the other hand, it is contended by the learned Public Prosecutor that such a restriction of the scope of the section would impair its practical usefulness as a provision authorising preventive or precautionary proceedings being instituted against persons who, in the opinion of the local Magistrates, are likely to disturb public tranquillity, and it is therefore urged that a wider construction should be placed upon it. The language of the provision is by no means free from ambiguity and there is considerable divergence of judicial opinion on the point. See, for example *High Court Proceedings No. 1952 (29th August, 1876)*,[1] *Maruthapalli Gounder* v. *Emperor*[2], and *Rajah Run Bahadoor Singh* v. *Ranee Tilessuree Koer*[3], relied upon for the petitioners; and *Kumarappa Chettiar* v. *Emperor*,[4] and the decision of Lakshmana Rao, J., in

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*5th September, 1939.

1. (1876) 2 Weir 49.
2. (1937) M.W.N. 48.
3. (1874) 22 W.R. (Crl.) 79.
4. (1937) M.W.N. 1072.

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Crl. R. C. No. 105 of 1939 (not yet reported), relied upon by the Public Prosecutor.

Having regard to the general importance of the question raised and the conflict of decisions referred to above, I think it is desirable that there should be an authoritative ruling on the point by a Division Bench or Full Bench and I therefore direct this case to be placed before my Lord the Chief Justice, for necessary orders as to posting.

These petitions on a reference by the Honourable Mr. Justice Patanjali Sastri came on before a Full Bench.

The Court made the following

Leach, C.J.

ORDER: *The Chief Justice.*—In the village of Negamam in the Coimbatore District there are two factions and there is strong enmity between them. Their enmity dates back to the Legislative Assembly elections held in 1934, if not earlier. At the present time the factions are opposing one another with regard to the management of an institution known as the Lakshmi Vilas and Dravyasagaya Nidhi. Limited and the management of a temple known as the Kannikaparameswari temple. On the 23rd September, 1938, the Sub-Divisional Magistrate of Pollachi served notice on twelve persons under S. 112 of the Code of Criminal Procedure, calling upon them to show cause why they should not be ordered to execute security bonds under S. 107. According to an affidavit of the petitioner in Crl. R. C. No. 245 of 1939 filed in the present proceedings rioting had taken place on *that day*. The accusations against these twelve persons, who have been referred to as the counter-petitioners, are set out in paragraph 3 of the petitioner's affidavit which reads as follows:—

"The counter-petitioners 1 to 12 noted in column 4 who are residents within the jurisdiction of the Sub-Divisional Magistrate, Pollachi, and who are members, partisans and hirelings of a faction of which Pillaya Chetty of Negamam is the leader, have been systematically committing acts of rowdyism, assault, trespass and intimidation on members of the opposite party and on 23rd September, 1938, all of them were found armed with weapons for a similar purpose endangering public peace. The feelings between the parties are very much strained and they are likely to come to a clash at any moment resulting in a breach of peace disturbing the public tranquillity seriously. Hence it is requested that the counter-petitioners may be ordered to execute a bond with sureties for keeping peace for a period of one year. Pending termination of the proceedings all the counter-petitioners may be ordered to execute interim bonds as breach of peace is likely to occur at any time."

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The Magistrate considered that the information was of such a nature that he was justified in ordering the counter-petitioners to execute interim security bonds. These bonds were executed on the 14th October, 1938. On the 5th February, 1939, the police laid information against the petitioner, and it is obvious from the notice which was subsequently served upon him under S. 112 that the information was to the effect that he was also a leader of the faction of which the counter-petitioners were said to be members and was giving them active support. At the same time information was laid against Pillaya Chetti, the person previously referred as the leader of the faction and one Mylsami Goundan. The Magistrate was satisfied that there was a likelihood of a breach of the peace occurring and issued notice under S. 112 against the petitioner and the two other persons. In this notice they were referred to as counter-petitioners 13, 14 and 15 respectively. The petitioner says that the notice served upon him does not comply with the requirements of the section and that the proceedings which have been instituted against him have been unlawfully instituted. The notice reads as follows:—

"Whereas it has been made to appear to me by credible information that there are two factions in the village of Negamam led by Annal Chetti on the one side and Muthuswami Chetti (petitioner) and Pillaya Chetti on the other side;

That there is misunderstanding between Annal Chetti and counter-petitioners 13 and 14 (Muthuswami Chetti and Pillaya Chetti) regarding the management of Lakshmi Vilas and Dravyasagaya Nidhi, Limited and owing to the Delhi Assembly elections in 1934 and also in respect of the management of the Kannikaparameswari temple;

That there is dispute and civil litigation between the two factions regarding possession of the temple lands, that consequently the feelings between the two parties have become strained and that there is likelihood of a breach of the peace in the village, that counter-petitioners 13 to 15 (petitioners herein and the counter-petitioners 14 and 15) are giving active support to counter-petitioners 1 to 12 to further their nefarious activities in the village;

That counter-petitioner 15 trespassed into the house of Kamatchi Chetti on the 23rd September, 1938 and created trouble;

That counter-petitioners 1 to 12 who were responsible for the disturbance in the village on 23rd September, 1938, had come there at the instance of counter-petitioner 15 to help counter-petitioner 14 and his son and to retaliate the attempted attack on them on 21st September, 1938;

That you are likely to commit a serious breach of the peace and disturb the public tranquillity at the village of Negamam;

You are hereby required under S. 107 (1) of the Criminal Procedure Code to appear before this Court at 11 A.M. on 8th March, 1939, at Pollachi

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and to show cause why you should not be ordered to execute bonds for Rs. 1,000 each with two sureties each in a like sum to keep the peace for one year."

As pointed out by our learned brother Patanjali Sastri, J., in referring the order, the petitioner's case is that a notice under S. 107 of the Code of Criminal Procedure must relate to a breach of the peace or wrongful act in contemplation at the time when information is given to the Magistrate, and that a notice which does not go to this length is necessarily void. The Public Prosecutor challenges this contention and says that if the section were so interpreted it would impair its practical usefulness.

S. 107 (1) states:—

"Whenever a Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate or Magistrate of the First Class is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity, the Magistrate if, in his opinion, there is sufficient ground for proceeding, may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without surety, for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix."

The requirements of this sub-section are therefore:—(1) There must be information that a person is likely to commit a breach of the peace or disturb the public tranquillity or do a wrongful act which may probably cause a breach of the peace or disturb the public tranquillity; (2) the Magistrate, if he is of the opinion that there is sufficient ground for requiring the person against whom the information is laid to show cause why he should not be ordered to execute a security bond for keeping the peace, should issue notice to him; (3) and in calling upon the person to show cause the Magistrate must proceed "in manner hereinafter provided" which means that he must issue a notice in accordance with the requirements of S. 112. That section says that when a Magistrate deems it necessary to require a person to show cause he shall make an order in writing setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character, and class of sureties (if any) required. As will be shown presently, S. 112 has on occasions been misread and further particulars than those required by the section have been insisted upon. All that the section requires is that the substance of the information shall be set forth and if this is done and the other requirements of the section are complied with the notice is a valid one.

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S. 117 provides the procedure to be followed when a notice has been issued under S. 112. When an order under S. 112 has been read or explained under S. 113 to a person present in Court, or when a person appears or is brought before a Magistrate in compliance with, or in execution of a summons or warrant issued under S. 114 the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken and to take such further evidence as may appear necessary. The enquiry shall be made as nearly as may be practicable where the order requires security for keeping the peace, in the manner prescribed for conducting trials and recording evidence in summons cases. Therefore, before a person on whom a notice has been served under S. 112 can be required to enter into a security bond under S. 107 the matter must be fully investigated by the Magistrate.

The cases on which the petitioner relies in support of his contention that the notice must set forth the particular breach of the peace or wrongful act in contemplation are *High Court Proceedings No. 1952 dated 29th August, 1876*[1], and the decisions in *Nagi Reddi Konda Reddi* v. *Emperor*[2], *Maruthapalli Gounder* v. *Emperor* , *Santhanaramaswami* v. *Emperor*[4] and *In re Kalia Goundan*[5]. In the *High Court Proceedings No. 1952 dated 29th August, 1876,* complaints were made against 21 persons that they were constantly creating disturbances in bazars and they were called upon to show cause why they should not be bound over to keep the peace. The Court expressed the opinion "that the act of which information is given and in respect of which security is required must be an act which is shown to be in contemplation at the time the information is given and not merely one a repitition of which may be apprehended from past misconduct of the kind without anything further". This case was under the old Code, but the language of Ss. 107 and 112 was materially the same. While we agree that there must be something more than the past misconduct of the person proceeded against to justify a notice being served upon him we are unable to agree that the Code requires the information to show the particular act which is in contemplation at the time. The Magistrate must be

1. (1876) 2 Weir 49,
2. (1917) I.L.R. 41 Mad. 246.
3. (1937) M.W.N. 48.
4. (1937) M.W.N. 885.
5. (1930) 59 M.L.J. 887.

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satisfied that there is a likelihood of a breach of the peace. What will satisfy him must depend on the particular facts of the case.

In *Nagi Reddi Konda Reddi* v. *Emperor*[1], Abdur Rahim and Napier, JJ., considered that proceedings under S. 107 of the Criminal Procedure Code should be quashed if the notice issued did not give particulars of the persons threatened and when the apprehension of a breach of the peace arose. There the notice stated that:

"The seven persons headed by Nagi Reddi Konda Reddi the first accused, a rich and influential resident of Kaluvoy, and others are addicted to crimes of violence involving a breach of the peace and threatened injury to the lives and property of several persons and there is an imminent danger of a breach of the peace."

The decision in a particular case must depend on the facts of the case and we are unable to agree that the absence of such particulars as these would necessarily vitiate the notice. In the first instance the particulars may not have been given to the Magistrate, but nevertheless he may have been convinced that there was a likelihood of a breach of the peace, in which case it was his duty to issue the notice. The passing of an order requiring security will, of course, depend on the nature of the evidence given at the subsequent inquiry.

In *Maruthapalli Gounder* v. *Emperor*[2], Pandrang Row, J., accepted the proposition that it was necessary to state in the notice the likelihood of the commission in the near future of a particular breach of the peace or a wrongful act likely to lead to a breach of the peace. In *Santhanaramaswami* v. *Emperor*[3], King, J., considered that the notice in that case was wrong because neither time, nor place, nor any indication of the identity of the persons alleged to have been threatened had been given but, here the learned Judge was insisting upon something which the section does not insist upon. In *Kumarappa Chettiar* v. *Emperor*[4], King, J., rightly observed that in order to justify an order under S. 107 it must be proved that the persons concerned are likely to break the peace. In *Kalia Goundan, In re*,[5] Krishnan Pandalai, J., considered that S. 112 requires the Magistrate to give an "abstract of the facts" upon which he charges the persons proceeded against with being likely to

1. (1917) I.L.R. 41 Mad. 246.
2. (1937) M.W.N. 48.
3. (1937) M.W.N. 885.
4. (1937) M.W.N. 1072.
5. (1930) 59 M.L.J. 887.

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commit a breach of the peace. If by an abstract is meant something more than the substance of the information we do not agree. The learned Judge did not regard the notice in that case as being sufficient but this opinion is certainly to be doubted. It is, however, not necessary for the purposes of this case to discuss the facts of that case as the judgment does not appear to go beyond the other judgments to which reference has been made.

There is no doubt that action taken under S. 112 constitutes a judicial act and therefore the Magistrate should not act arbitrarily. There must be information of a nature which convinces him that there is a likelihood of a breach of the peace. It is impossible to formulate a hard and fast rule with regard to the nature of the information on which a Magistrate should act. What is reasonably sufficient to satisfy a Magistrate must depend on the particular situation. The person who gives the information may not be in a position to give details, but the source of the information may be sufficient to convince the Magistrate that a breach of the peace is likely, and if he is convinced the law requires him to take action. We consider that Knox, J., aptly stated the position in *Jaguji Rai* v. *Emperor*[1], when he said:—

"As I read this section, there may be cases in which a Magistrate of the first class is merely informed that a person is likely to disturb the public tranquillity without any information being given as to his intent to do wrongful acts. The Magistrate is responsible for the peace of the district. He acts upon this information and he is required to set forth in writing the substance of the information received In this case we are not told that the Magistrate has received any information of definite acts intended Apparently from the information he received he was satisfied that the persons concerning whom the information had been given were likely to commit some act which might occasion a breach of the peace. The reason given for this probability was that they were on terms of enmity with each other. Where the Magistrate can go into further particulars, he should certainly go into them. But it may well be that all the information he receives is that there will be a breach of the public peace, and if he considers that information to come from a reliable source, he has jurisdiction to make the order required by S. 112."

The High Court has undoubtedly power to quash proceedings where the notice issued does not comply with the requirements of S. 112, but before doing so it must be satisfied that there has been a failure to comply. It must be remembered that the issue of the notice is merely a preliminary step and no

1. (1918) 16 A.L.J. 567.

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order can be passed under S. 107 unless the inquiry which follows the issue of the notice shows that the laying of the information was justified. The High Court can always interfere when the inquiry has not been held in accordance with the law or a wrong conclusion has been arrived at. Far too much stress has been laid in the past on the wording of the notice and too little regard paid to the safeguards provided by the subsequent procedure.

In the course of the arguments advanced on behalf of the petitioner several cases have been quoted which relate to action taken under S. 110. There are conflicting decisions on the question of what the notice in such a case should contain. It is, however, not necessary for us to discuss the cases relating to S. 110. S. 107 is a self-contained section and the Court is not required for the purposes of this petition to travel beyond the cases which have reference to that section.

Now, applying the provisions of S. 112 to the notice issued in this case what is the position? The notice states that the petitioner is a leader of one of the rival factions in the village, that the feelings between the factions have become strained, that there is a likelihood of a breach of the peace in the village and that the petitioner is giving active support to the members of his faction to further their nefarious activities in the village. The nefarious activities referred to are known to the petitioner who has set them out in the affidavit which he has sworn and filed in support of his petition asking for the quashing of the proceedings. It is impossible in these circumstances to say with reason that the substance of the information received by the Magistrate has not been set out and it is also impossible to say with reason that there is no case shown for inquiry under S. 107. We regard this notice as complying with the requirements of the section, and therefore there is no foundation for the application to this Court to exercise its revisional powers. It follows that the petition must be dismissed and the Magistrate will proceed with the inquiry in accordance with law.

K.C.   *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Manickavasaka Thevar and another .. *Appellants** (*Defendants*)

v.

Chidambaram Pillai .. *Respondent* (*Plaintiff*).

Manickavasaka Thevar *v.* Chidambaram Pillai.

Madras Estates Land Act (I of 1908), S. 117—Provision whether obligatory or directory—Test—Disregard of provisions as to sale—Effect—Absence of injury as result of irregularity—Effect.

Whether the terms of a statute are to be regarded as imperative or directory only turns upon a correct appreciation of the scope of the Act itself and is not to be controlled by the consideration whether substantial injury has or has not resulted.

Where the selling officer whose duty it was to fix the date of the sale, settle the proclamation and cause the sale to be proclaimed, disregarded the provisions of the statute and he did not pass a single order and the orders which the selling officer should have passed were passed by the Collector who had no authority it is not a mere irregularity and the sale cannot be regarded as a sale lawfully held under the Act. There is no provision in the Estates Land Act which is similar to O. 21, r. 90, Civil Procedure Code, which says that a sale shall not be set aside as the result of irregularity or fraud unless the applicant has sustained substantial injury as the result.

Kadirvelu Ambalam v. *Alagappan Ambalam*, (1934) 40 L.W. 535, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in A. S. No. 61 of 1935, preferred against the decree of the Court of the District Munsif of Tenkasi in O. S. No. 373 of 1933.

N. S. Rangaswami Aiyangar for Appellants.

K. Venkateswaran for Respondent.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—This appeal arises out of a suit filed by the respondent in the Court of the District Munsif of Tenkasi for a decree setting aside a sale held under the Madras Estates Land Act, 1908, and for a declaration of his title. The land in suit formed part of a mitta of which the second appellant is the mittadar. The ryot was one Namasivaya Moopanar who became insolvent in 1926. His insolvency, however, did not result in the disturbance of his possession. The Official Receiver took no steps to take over the land, nor even to notify the landlord of the ryot's insolvency. Before the insolvency the

* S. A. No. 23 of 1936 3rd October, 1939.

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ryot had mortgaged the holding to the respondent, who brought a suit to enforce his mortgage and impleaded the Official Receiver as a defendant. A mortgage decree was obtained and on the 18th October, 1929, the property was sold in execution, the respondent being the auction-purchaser. He took possession of the property from the ryot on the 19th December, 1929. In 1932 the second appellant instituted proceedings for the recovery of the rent then due. The property was still registered in the name of Namasivaya Moopanar, who was made the respondent in the proceedings. The property was brought to sale on the 15th October, 1932, and was purchased by the first appellant.

It will be convenient to interrupt the narrative here in order to refer to the relevant provisions of the Madras Estates Land Act, 1908. S. 112 provides that when the landholder to whom an arrear is due intends to avail himself of the powers given by S. 111 to sell the property, he shall serve on the defaulter through the Collector a written notice, stating the amount due for arrears, interest and costs, if any, the period for which and the holding in respect of which it is due, and informing him that if he does not pay the amount or file a suit before the Collector contesting the right of sale within 30 days from the date of service of the notice, the holding or any part thereof specified in the notice will be sold. S. 113 requires that intimation of the date of service shall forthwith be given to the landholder by post. S. 114 says that if the amount of the arrear is not paid and if no suit contesting the right of sale is instituted before the Collector within 30 days from the date of service of the notice, or if such suit has been decided against the defaulter, the landholder may apply to the Collector for sale. S. 115 provides that if no suit has been instituted the application for sale shall be made within 45 days of the posting by the Collector of intimation of service under S. 113. No suit was filed by the defaulter and it is common ground that the provisions of Ss. 112, 113, 114 and 115 so far as they were applicable were followed. S. 116 says that immediately on receipt of the application for sale the Collector shall appoint an officer to conduct the sale. S. 117 requires the selling officer by order (*i*) to fix a date for the sale, (*ii*) to cause the sale to be proclaimed by beat of drum in the village in which the holding is situated, and (*iii*) to post a copy of his order in some conspicuous place in the village. This section

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clearly contemplates the selling officer settling the terms of the proclamation.

In this case the Collector fixed the date for the sale, settled the terms of the sale proclamation and himself caused it to be proclaimed. He signed the sale proclamation as the selling officer, which he had no power to do as he was not the selling officer. The sale proclamation was settled on the 8th September, 1932, and was proclaimed by a process-server acting under his orders on the 14th September, 1932. By an order dated the 11th September, 1932, the Collector appointed a selling officer, but all that the selling officer did was to preside at the auction. The respondent's case is that by reason of the non-compliance with the provisions of S. 117 the sale was unlawful. The District Munsif accepted this contention and decreed the suit. The decision was upheld on appeal by the Subordinate Judge. While admitting that there were the irregularities complained of by the respondent the appellants contend that the provisions of S. 117 of the Act are merely directory and that in as much as the disregard of them has resulted in no loss being suffered, the Court is not entitled to set aside the sale.

It does not necessarily follow because imperative language is used in a section that a disregard of its provisions will render action taken void. In the *Liverpool Borough Bank* v. *Turner*[1], Lord Campbell, L. C., said:

"No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature, by carefully attending to the whole scope of the statute to be construed."

The authorities were examined by Lord Penzance in *Howard* v. *Bodington*[2] and he arrived at the same conclusion as Lord Campbell. Lord Penzance summed up the position in these words:—

"I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

The sections in the Madras Estates Land Act, 1908, to which I have referred state what should be done before a ryot's

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1. (1861) 30 L.J. 379. 2. (1876) L.R. 2 Pro. 203.

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holding is sold for arrears of rent. In this case there was almost a complete disregard of the statute. The selling officer whose duty it was to fix the date of the sale, settle the proclamation and cause the sale to be proclaimed did none of these things. He did not pass a single order. The orders which the selling officer should have passed were passed by the Collector, who had no authority. With such great disregard of what the legislature says shall be done by the selling officer we are unable to regard the disobedience as amounting to mere irregularity. We consider that in view of the degree of disobedience the sale cannot be regarded as a sale lawfully held under the Act. In *Kadirvelu Ambalam* v. *Alagappan Ambalam*[1], Krishnan Pandalai, J., also held that material irregularity deprived a sale of all validity.

Our attention has been drawn to the proviso to O. 21, r. 90, Civil Procedure Code, which says that a sale shall not be set aside as the result of irregularity or fraud unless the applicant has sustained substantial injury as the result. There is no such provision under the Act which governs this case. Moreover, substantial injury would be done to the respondent if the sale were allowed to stand. He would lose all benefit from his mortgage decree.

The appeal will be dismissed with costs.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I entirely agree. The decision of the question whether the terms of a statute are to be regarded as imperative or directory only turns upon a correct appreciation of the scope of the Act itself and is not to be controlled by the consideration whether substantial injury has or has not resulted. This is the true principle to be gathered from the judgments of Lord Campbell and Lord Penzance in the cases referred to by my Lord. The absence of any reference to the question of substantial injury is in my view significant and the inference is plain that neither of the Lord Chancellors (?) considered it to be an element which could affect the decision one way or the other.

K. S. *Appeal dismissed.*

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1. (1934) 40 L.W. 535.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD THANKERTON, LORD ROMER AND SIR GEORGE RANKIN.

A. Ranganatham Chetti and others .. *Appellants**

v.

M. Ethirajulu Nayudu .. *Respondent.*

P.C.

Ranganatham Chetti *v.* Ethirajulu Nayudu.

Madras City Tenants Protection Act (III of 1922), Ss. 1 (3) and 2 (4)—Applicability—Lease for ten years from 1st October, 1912—New lease dated 1st February, 1923, at increased rent for a term of ten years from 1st October, 1922—If lessee entitled to the benefits of the Madras City Tenants Protection Act of 1922—Tenancy if one created before the commencement of the Act—Lessee if a tenant continuing in possession after the termination of a tenancy.

By S. 1 (3) of the Madras City Tenants Protection Act, 1922, which came into force on 21st February, 1922, the Act is only to apply to tenancies created after the Act came into force. By S. 2 (4) the word "tenant" is defined as including the persons who continue in possession after the termination of the tenancy.

Certain land in Madras was leased for 10 years from 1st October, 1912. Before the expiry of the lease, the lessor and lessee made an agreement for a fresh lease for 10 years at an increased rent. The formal lease for that period (expiring on 30th September, 1932) was executed on 1st February, 1923, after the City Tenants Protection Act had come into force. On the lessee's death in 1930, his sons became tenants in his place. When the lessor claimed surrender of possession of the land, the lessees claimed to be entitled to the benefits of the Act of 1922, and sought to compel the landlord to sell the land to him for a price to be fixed by the Court.

Held, that the Act was not applicable, the lessees not being tenants continuing in possession without a tenancy title after the termination of the tenancy of 1912, such tenants alone being included in the words "persons who continue in possession after the termination of the tenancy" and the tenancy ending in September, 1932, being, notwithstanding physical continuity of possession of the land, a new tenancy created in September, 1922, that was, after the Act came into force and not a mere continuation of the tenancy created in 1922.

Appeal from a judgment and decree of the High Court, Madras (Beasley, C. J. and Cornish, J.) in its Civil Appellate Jurisdiction, dated 31st March, 1937, affirming a decree of the same Court in its original civil jurisdiction dated 8th October, 1937.

The facts appear sufficiently from the judgment.

C. S. Rewcastle, K. C. and *P. V. Subba Rao* for Appellants.

W. W. K. Page for Respondent.

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* P. C. Appeal No. 61 of 1938. 31st October, 1939.

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31st October, 1939. Their Lordships' judgment was delivered by

LORD THANKERTON.—This is an appeal from a judgment and decree of the High Court of Judicature at Madras, in its civil appellate jurisdiction, dated the 31st March, 1937, which affirmed a judgment and decree of that Court, in its ordinary original civil jurisdiction, dated the 8th October, 1936.

In the suit, which was filed on the 25th January, 1933, the respondent, as plaintiff, seeks delivery of possession by the appellants of a plot of land in Muthiappan Street, Georgetown, Madras, and the superstructure thereon, mesne profits, and a declaration as to the amount payable to the appellants as the market value of the superstructure, in terms of a lease by the respondent to the appellants' father and predecessor in title for a term of ten years, which expired on the 30th September, 1932.

The only question in the appeal is whether the appellants' claim that the Madras City Tenants' Protection Act, 1921 (Act III of 1922) is applicable in the present case is well-founded. Both Courts below have rejected this contention.

The respondent and his undivided brother, by lease dated the 18th October, 1912, leased the plot of land in suit to the appellants' father, for a period of ten years from the 1st October, 1912, the tenant being at liberty to erect a superstructure on the land. In fact there was already a superstructure thereon, erected by the previous lessee, from whom the appellants' father had bought it shortly before obtaining his own lease. The appellants' father improved the superstructure during his tenancy, and shortly before its expiry on the 30th September, 1922, there were negotiations which resulted in an agreement by the respondent, who had become sole owner under a partition with his brother in 1917, to give a fresh lease at an increased rent, in order that further building operations should go on.

On the 1st February, 1923, the formal lease was executed, under which the plot of land was leased to the appellants' father for a term of ten years from the 1st October, 1922, at an increased rent of Rs. 100 per month, on the following recital:—

"Whereas sometime prior to the expiry of the said lease the lessor agreed to grant the lessee a new lease of the said plot of land for a period of ten years commencing from the 1st October, 1922, upon terms and conditions

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hereinafter appearing, and whereas the lessee has built on the said plot of land a substantial superstructure on the strength of the said agreement."

It was provided that the lessee should always and in any event be entitled to be paid the price of the superstructure built on the said plot of land before he surrendered possession of the land, either on the expiry of the lease thereby granted or any other future lease or at any time, and that the price should be fixed according to the market value of the buildings as at the time of ascertainment and payment. It appears that, on the strength of this agreement, the appellants' father had demolished the existing building and erected a substantial structure.

The appellants' father died in 1930, and the appellants became the tenants under the lease, which expired according to its terms on the 30th September, 1932. On the 9th October, 1932, the respondent sent a notice to the appellants claiming surrender of possession and offering the present value of the superstructure as it existed at the commencement of the lease, which was put by him at Rs. 3,000. On the 7th November, the appellants replied claiming the benefit of the Madras City Tenants' Protection Act, and disputing the valuation and the claim, and the present suit was thereafter filed by the respondent. It may be mentioned that the Trial Judge held, against the respondent, that under the lease the respondent was bound to pay the value of the superstructure as it existed at the expiry of the lease, and that the respondent accepted that decision.

The Madras City Tenants' Protection Act came into force on the 21st Febuary, 1922, and by S. 1 (3) it is provided that the Act shall apply only to tenancies created before the commencement of the Act. Under S. 2 (4) "Tenant" is defined as meaning a tenant of land liable to pay rent on it, every other person deriving title from him, and includes persons who continue in possession after the termination of the tenancy. The leading provision of the Act is to be found in S. 3, which provides:—

"3. Every tenant shall on ejectment be entitled to be paid as compensation the value of any building, which may have been erected by him, by any of his predecessors in interest, or by any person not in occupation at the time of the ejectment who derived title from either of them, and for which compensation has not already been paid. A tenant who is entitled to compensation for the value of any building shall also be paid the value of trees which may have been planted by him on the land."

Under S. 6 (1) a tenant who is entitled to compensation under S. 3, and against whom a suit in ejectment has been

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instituted, may apply to the Court for an order that the landlord shall be directed to sell the land for a price to be fixed by the Court. The appellants made an application under this section. By S. 12 it is provided that nothing in any contract made by a tenant shall take away or limit his rights under this Act, provided that nothing cotained in the Act should affect any stipulations made by the tenant in writing registered as to the erection of buildings, in so far as they related to buildings erected after the date of the contract.

Their Lordships are of opinion that the latter part of the definition of "tenant" in S. 2 (4) refers to persons who without a tenancy title continue in possession after the termination of the tenancy, and that the benefit of the remaining sections including S. 12, on which the appellants sought to rely, cannot be of avail to the appellants unless and until they have shown that the tenancy here in question was created before the commencement of the Act within the meaning of S. 1 (3).

The appellants maintain that the tenancy which terminated on the 30th September, 1932, was created by the lease of 1912, the lease of 1923 being merely a continuation of the earlier lease, and they refer to the verbal agreement made before the expiry of the 1912 lease in support of this argument. But their Lordships are clearly of opinion that, though the physical possession was continuous, the possession from the 1st October, 1922, was attributable to a new tenancy, which was formally embodied in the lease dated the 1st February, 1923, the increased rent thereby provided having been paid by them from the 1st October, 1922, in terms of the verbal agreement for a lease. Their Lordships, accordingly, concur in the view of both the Courts below, that the tenancy here in question was not created before the commencement of the Act, and that the Act does not apply.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs, and that the judgments appealed from should be affirmed.

Solicitors for Appellants: *T. L. Wilson & Co.*

Solicitors for Respondent: *Lambert & White.*

R.C.C.
K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KUNHI RAMAN.

R. V. & Co. .. *Petitioners** (*Applicants*)

v.

The Hindu Religious Endowments Board and others .. *Respondents.*

R. V. & Co. *v.* H. R. E. Board.

Madras Hindu Religious Endowments Act (II of 1927), Ss. 34 and 76—Lease of property of a non-excepted temple, under S. 76 (1)—Cancellation by the Board in exercise of its powers under S. 34—If unlawful and to be quashed by writ of certiorari.

Where a lease was lawfully sanctioned by the Committee, executed by the trustees and registered, the title of the lessee can only be taken away from him under the procedure contemplated by sub-S. (2) of S. 76, namely, an application to the Court. S. 76 must be regarded as an exception to S. 34. The action of the Board in taking steps with a view to the cancellation of such a lease under S. 34 is unlawful and proceedings must be quashed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order calling for the records and the order in O. A. No. 121 of 1939 on the file of the Hindu Religious Endowments Board, Madras and to quash the said proceedings by the issue of a writ of *certiorari.*

Srinivasaraghavan and *Thiagarajan* for Petitioners.

V. V. Chowdhury, M. Seshachalapathi, T. V. Ramiah, K. Parasurama Aiyar and *N. T. Raghunathan* for Respondents.

The Judgment of the Court was delivered by

Leach, C.J. *The Chief Justice.*—The petitioner has applied for the issue of a writ of *certiorari* with the view to the quashing of the proceedings taken by the Hindu Religious Endowments Board for the cancellation of a lease granted to him by the trustee of the temple of Sri Adimooleswarar, Agaram, Chidambaram Taluq, South Arcot District. Notice was issued to the Board and the Court has heard the arguments of the learned Advocates who have appeared for the respective parties. In August, 1938, the petitioner applied to the trustee of the temple for a lease for a term of 99 years of certain lands belonging to the temple. His intention was to utilize the lands for salt pans. The trustee granted the lease and it was registered on the 29th of August, but it had not been sanctioned by the South Arcot

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* C. M. P. No. 2002 of 1939. 28th August, 1939

Temple Committee and therefore admittedly it was invalid. On the 30th November, 1938, the matter of the lease was considered by the Committee which resolved to cancel it, but decided to sanction a new lease for a period not exceeding 25 years. In pursuance of the resolution passed by the Committee the trustee granted a lease to the petitioner on the same terms as the cancelled lease, except that the period was reduced from 99 years to 25 years. The resolution of the Committee can only be read as sanctioning a lease on the same terms as the previous lease with this modification.

In the neighbourhood of the land covered by the lease are salt pans owned by a salt contractor carrying on business under the style of Sri Sivananaiutha Nadar and Company. The proprietor of this firm felt aggrieved at the granting of the lease to the petitioner and moved the Board to cancel it. The result was that the petitioner was called upon to show cause why his lease should not be cancelled. The decision of the Board was embodied in an order dated 5th April, 1939. The Board considered that the resolution of the Committee sanctioning the lease was improper and not in accordance with the requirements of the law. The reasons for this opinion are stated and are these:—The Committee had not shown why a lease for 25 years should be granted; when a lease is granted for more than five years S. 76 of the Madras Hindu Religious Endowments Act, 1926, requires it to be established that it is necessary or beneficial to the temple and this had not been done; the lease had been given privately and not as the result of public auction; the lease would not be beneficial to the temple and it would change the character of the land, there being on it 70 tamarind trees bearing fruit. The area covered by the lease is 24 acres. In pursuance of this order the Board called upon the Temple Committee to submit a report on the action taken by the Committee in sanctioning the lease. It is admitted that in passing these orders the Board purported to be exercising powers conferred upon it by S. 34 of the Act. The petitioner says that the section does not vest the Board with power to cancel the lease and that action with a view to its cancellation can only be taken under the provisions of S.76.

S. 34 of the Act reads as follows:—

"1. The resolutions of a Committee shall be carried into effect by its President in whom the entire executive power of the Committee shall, save as hereinafter provided, be vested.

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"(a) All the resolutions of a Committee shall be notified to the Board within one week after they are passed.

(b) The Board may call for any record or proceedings or other document or paper from any Committee for the purpose of satisfying itself as to the correctness, regularity or propriety of any order or proceedings recorded or passed by such a Committee.

(a) The Board shall have the power of staying, for reasons to be recorded by it, the execution of any of the resolutions of the Committee and remitting the same to the Committee for reconsideration.

"(b) If the Committee upon such reconsideration confirm the said resolutions, the Board may, whenever it deems such step necessary in the interests of the temple affected or the proper management of the affairs of the Committee, modify or cancel the said resolutions."

S. 76 is in these terms:—

1. No exchange, sale or mortgage and no lease for a term exceeding 5 years, of any immovable property belonging to any math or temple shall be valid or operative unless it is necessary or beneficial to the math or temple and is sanctioned by the Board in the case of maths and excepted temples and by the Committee in the case of other temples.

2. The trustee of the math or temple or any person having interest may within one year of the date of the order of the Board or Committee under sub-S. (1), apply to the Court for modifying or cancelling such order.

3. The order of the Board or Committee under sub-S. (1) when no application is made under sub-S. (2) and the order of the Court when such application is made shall be final."

The temple with which this application is concerned is a non-excepted temple and therefore the temple Committee had full power under sub-S. (1) to sanction the lease.

The learned Advocate for the petitioner contended that inasmuch as the lease was lawfully sanctioned by the Committee, executed by the trustee and registered, he has obtained a title which can only be taken away from him under the procedure contemplated by sub-S. (2) of S. 76, namely, an application to the Court. There can be no doubt that this contention is sound, unless S. 76 must be read as being subject to S. 34. For the Board it is said that S. 76 must be read as being subject to S. 34, because all the provisions of S. 34, except those of sub-S. (1) were added by a later Act, namely, the Madras Hindu Religious Endowments Act of 1930.

The rule of construction to be applied here was stated by Best, C. J., in *Churchill* v. *Crease*[1]:

"The rule is, that where a general intention is expressed, and the act

1. (1828) 5 Bing. 177; 130 E.R. 1028.

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expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception."

There has been no modification of this rule by subsequent decisions. Therefore S. 76 must be regarded as an exception to S. 34. I cannot accept the argument that the fact that sub-Ss. 2 and 3 of S. 34 were inserted later affects the rule. No doubt it was the intention of the Legislature in amending S. 34 to invest the Board with large powers and it is the intention of the Act that the Board shall have powers of superintendence, but this does not mean that the Board has the power to interfere with the rights of third parties. That is what the Board is contemplating doing here. The Board would have power to interfere with the resolution of the temple Committee before the resolution is carried into effect and in some cases it may have power to interfere after the resolution has been given effect to, but it has not got the power to cancel a lease. The Legislature has placed the power of interference expressly in the Court and if the action of the temple Committee in sanctioning the lease was improper the Court, and the Court alone, can interfere. The action of the Board in taking steps with a view to the cancellation of the petitioner's lease under S. 34 is unlawful and the proceedings must be quashed. This does not mean that the Board will not be able to call for a report from the temple Committee with a view to possible action under S. 76, but it cannot cancel the lease as it obviously intends to do.

I would add that the learned Advocate for the petitioner appeared before the Board before the passing of the order on 5th April, 1939, and made representations which he has made to us to-day, but there is no reference in the proceedings to this and action was taken by the Board in spite of the protest against its validity.

The petitioner is entitled to his costs which will be paid by the first and second respondents. The third respondent, the trustee, has not opposed the application.

K. S. *Proceedings quashed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE PANDRANG ROW, MR. JUSTICE ABDUR RAHMAN, MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE PATANJALI SASTRI.

Minor C. R. Ramaswami Aiyangar, represented by his mother and next friend Lakshmi Ammal .. *Petitioner** (*Plaintiff*)

v.

C. S. Rangachariar and others .. *Respondents* (*Defendants 1 to 11 and 14 to 26*).

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Ramaswami Aiyangar *v.* Rangachariar.

Court-Fees Act (VII of 1870) (as amended in Madras), Ss. 7 (iv) (b), 7 (v) and Art. 17-B of Schedule II—Joint Hindu family—Suit for partition— (i) *Prayers for partition and possession of plaintiff's share*; (ii) *Prayer for setting aside alienations in which possession had passed to alienees*; (iii) *Prayer for setting aside decrees to which plaintiff was* eo nomine *a party*; (iv) *Impugning debts and decrees to which plaintiff was not a party*; *and* (v) *Prayer for appointment of interim receiver—Respective court-fees payable.*

A Hindu minor, through his mother as next friend, filed a suit for partition against his father and three brothers impleading twenty-two strangers, either as alienees of family properties or as creditors of the family stating that the transactions were not binding on the family. The prayers were for (*i*) an account of the family properties; (*ii*) the partition by metes and bounds and possession of plaintiff's share; (*iii*) the appointment of an interim receiver; (*iv*) costs of the suit; and (*v*) such further and necessary reliefs. The plaintiff valued his share of the family properties at Rs. 40,000 but stamped his plaint with a court-fee of Rs. 100 under Art. 17-B of the Court-Fees Act (as amended in Madras). On the question as to the stamping of the plaint,

Held, that (1) in respect of the general relief for partition and delivery to the plaintiff of his share if the words of S. 7 (*iv*) (*b*) are to be given their ordinary meaning they cannot apply to a suit for partition by a member of a joint family who is still in joint possession. The only provision in the Court-Fees Act which is applicable is Art. 17-B of Schedule II and the plaint is correctly stamped with a court-fee of Rs. 100.

Rangiah Chetty v. *Subramania Chetty*, (1910) 21 M.L.J. 21 (F.B.) (majority decision overruled).

(2) With regard to the transactions which the plaintiff challenges (though he has not asked for specific reliefs in respect of them) he must pay court-fee in accordance with the relief he is actually seeking. The plaintiff is in effect asking in respect of alienations where possession has passed to the alienee that they be set aside and that he be placed in possession of his share of the property alienated and in respect of such transactions the plaintiff has to

* C. R. P. No. 267 of 1936. 6th October, 1939.

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stamp his relief in accordance with the provisions of S. 7 (*v*) of the Court-Fees Act.

(3) In respect of decrees passed against him in suits in which he had been *eo nomine* impleaded as a party he must pay the fee prescribed by S. 7 (*iv*) (*a*). The plaintiff must be held to have impliedly asked for a cancellation of the decree passed against him and must accordingly stamp his plaint *ad valorem* on the amount of the decree and not merely on his share fraction as his liability is for the full amount though necessarily limited to the extent of his share in the joint family assets. It makes no difference that the plaintiff is a minor or merely a junior member of the family.

(4) (*Abdur Rahman, J.*, dissenting)—As regards the other creditors impleaded, the plaintiff cannot be called upon to pay any additional court-fee in respect of the transactions challenged. It will be for the respective defendants to establish their right to rank as creditors when the account is taken. (Case-law discussed.) [Per *Abdur Rahman, J.*—The prayer for accounts must be taken to be equivalent to a prayer for declaration that the debts and alienations are not binding on the plaintiff and a prayer for declaration cannot be regarded as either superfluous or ancillary. The plaintiff should be asked to pay court-fee as for simple declarations under Art. 17-A (*i*).]

(5) Neither can the plaintiff be called upon to pay a separate court-fee in respect of his prayer for the appointment of a receiver as the relief is entirely of an interlocutory character.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Kumbakonam dated 1st February, 1936, on the Check Slip of the Court-Fee Examiner No. 3, Part II, dated 18th October, 1935.

V. V. Srinivasa Aiyangar, S. Ramanujachariar and *V. R. Venugopalan* for Petitioner.

The Government Pleader (B. Sitarama Rao), T. S. Venkatarama Aiyar, K. R. Rangaswami Aiyangar, R. Rajagopala Aiyangar, S. Venkatesan and *R. Viswanathan* for Respondents.

The facts necessary for the report appear sufficiently from the judgment of his Lordship the Chief Justice.

This petition coming on for hearing on the 7th October, 1938, the Court (*Abdur Rahman, J.*) made the following

ORDER.—Mr. V. V. Srinivasa Aiyangar appears on behalf of the petitioner and urges that since there is a considerable differences of judicial opinion even in this presidency, it would be better to refer it to a Bench. The respondent's Counsel does not object to this course. The Government Pleader has not been notified in the matter. Notice to the Government Pleader may be given.

If the Honourable the Chief Justice agrees, the matter may be placed before a Bench for final adjudication.

F.B.

Ramaswami Aiyangar v. Ranga-chariar.

This petition coming on for hearing on 3rd March, 1939, the Court (*The Chief Justice, Krishnaswami Aiyangar* and *Somayya, JJ.*) made the following

ORDER.—One of the points raised in this case is whether Art. 17-B of Schedule II or S. 7 (*iv*) (*b*) of the Court-Fees Act applies. In *Rangiah Chetty* v. *Subramania Chetty*[1], a Full Bench of this Court held (one Judge dissenting) that S. 7 (*iv*) (*b*) applies. There have been decisions on this question in other High Courts and there is a divergence of opinion. The other questions involved in the present case are also of importance and in order that the questions may be definitely settled so far as this Court is concerned we consider that the case should be placed before a Bench of five Judges.

This petition coming on for final hearing in pursuance of the aforesaid order, the Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—This petition raises important questions with regard to the stamping of plaints in suits for the partition of estates of joint Hindu families. The petitioner is the minor son of a Hindu father. Through his mother as next friend he has filed a suit in the Court of the Subordinate Judge of Kumbakonam for partition of the family properties and for possession of his one-fifth share therein. He has joined as defendants his father, his three brothers, and twenty-two other persons. The stranger defendants are made parties either as alienees of family properties or as creditors of the family. In his plaint the plaintiff avers that the family is one engaged merely in agriculture and that before the matters complained of, it had large cash resources. He alleges that his father has engaged in reckless speculation in land, in trade, and in litigation with the result that the cash resources have disappeared, the family properties have been sold or mortgaged and numerous debts contracted. The plaintiff says that his father's transactions are not binding on the family, but he has not in terms asked for the setting aside of the alienations of family properties or for declarations that his father's other transactions are unenforceable against the estate. His prayers are for (*i*) an account of the movable and immovable joint family properties, (*ii*) the partition by metes and bounds of his

1. (1910) 21 M.L.J. 21 (F.B.).

one-fifth share, (*iii*) the appointment of a receiver to manage the properties and collect the rents and income till the disposal of the suit, (*iv*) the costs of the suit, and (*v*) such further and necessary reliefs as in the circumstances may be considered necessary and proper. He values his share of the family properties at Rs. 40,000 but has merely stamped his plaint with a court-fee of Rs. 100 under Art. 17-B of Schedule II of the Court-Fees Act as amended in Madras.

On the filing of the plaint the Subordinate Judge called for a statement of the transactions which the plaintiff says are invalid as against the family and a statement was submitted. From this statement and the order of the Subordinate Judge with which this petition is concerned the following particulars have been extracted:—

Item No	Nature of alienation or debt.	Amount Rs.	In whose favour.	Person or persons alleged to have entered into the transaction or have been held liable.
1.	Simple mortgage dated 15—11—1932.	45,000	5th defendant.	1st defendant for himself and as manager of the joint family.
2.	Simple mortgage dated 7—3—1934	7,600	6th and 7th defendants.	1st defendant.
3.	Simple mortgage dated 13—3—1934.	3,297	8th defendant.	Do.
4 (*a*)	Usufructuary mortgage dated 23—12—1933.	8,800	9th defendant.	Do.
(*b*)	Sale in Court auction in O. S. No. 15 of 1933, Sub-Court, Kumbakonam.	..	9th defendant.	(Not stated.)
5.	Promissory note, dated 14—3—1933.	4,000	10th defendant.	Defendants 1 and 26.
6.	Charge decree debt in O S. No. 39 of 1926 on the file of the Subordinate Judge's Court, Kumbakonam	26,000	11th defendant.	1st defendant.
7.	Simple money decree debt in S.C. No. 211 of Subordinate Judge's Court.	600	12th defendant.	(Not stated.)
8	Simple money decree debt in O.S. No. 42 of 1933 on the file of the Subordinate Judge's Court, Kumbakonam.	3,000	13th defendant.	1st defendant.

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Item No.	Nature of alienation or debt.	Amount Rs.	In whose favour.	Person or persons alleged to have entered into the transaction or have been held liable.
9.	Simple money decree debt in O.S. No. 23 of 1933, Mayavaram Subordinate Judge's Court.	6,343-7-8	14th defendant.	Defendants 1 to 4 and plaintiff.
10.	Simple money decree debt in O.S. No. 10 of 1933, Mayavaram Subordinate Judge's Court.	6,000	15th defendant.	Do.
11.	Sale dated 29th July, 1934.	18,879-5-8	18th defendant.	1st defendant.
12.	Simple money decree debt on the file of the Subordinate Judge's Court, Kumbakonam, O.S. No. 15 of 1933.	9,000	19th defendant.	Do.
13.	Decree in O. S. No. 298 of 1934, on the file of the District Munsif's Court of Valangiman.	3,680	20th defendant.	(Not stated.)
14.	Sale ..	750	21st defendant.	1st defendant.
15.	Simple money decree in S. C. No. 400 of 1933 of the Subordinate Judge's Court, Kumbakonam.	675	22nd defendant.	Do.
16.(a)	Simple mortgage.	5,600	23rd defendant.	1st defendant as manager.
(b)	Simple money decree debt in S.C. No. 375 of 1933 on the file of the Subordinate Judge's Court, Kumbakonam.	978	..	1st defendant.
17.	Simple money decree debt in S.C. No. 814 of 1933 on the file of the Subordinate Judge's Court, Kumbakonam.	246	24th defendant.	1st defendant,
18.	Simple money decree debt in O. S. No. 66 of 1933 on the file of the Subordinate Judge's Court, Kumbakonam.	5,513-8-5	25th defendant.	Defendants 1 to 4,
19.	Simple money debt.	400	26th defendant.	(Not stated,)

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It does not appear from the statement nor from the order of the Subordinate Judge why the 16th and the 17th defendants are made parties, though in the plaint it has been alleged that they are among the persons from whom the first defendant has borrowed.

The Subordinate Judge has held that as the plaintiff himself is "constructively" a party to the mortgage for Rs. 45,000 he must pay in respect of this matter a court-fee in accordance with the *ad valorem* scale specified in Art. 1 of Schedule I of the Court-Fees Act. He has also held that the plaintiff is constructively a party to the transactions which are items 9, 10, 11, 13, 16 (*a*) and 18 in the above table and has directed the plaintiff to pay a court-fee in respect of these items also on the *ad valorem* scale. In the Subordinate Judge's opinion the plaintiff is not even constructively a party to the other transactions, but he has held that he should pay under Art. 17-A (1) of Schedule II a court-fee of Rs. 100 in respect of each "for the relief of declaration." The Subordinate Judge has also called upon the plaintiff to pay a Court-fee of Rs. 100 under Art. 17-B of Schedule II because he has asked for the appointment of a receiver. The total amount payable by way of court-fees under this order is Rs. 6,324-9-0. The plaintiff contends that as he has not expressly asked for relief in respect of the transactions which he challenges he can only be called upon to pay a court-fee of Rs. 100 under the provisions of Art. 17-B of Schedule II in respect of his prayer to be put in possession of his share in the estate.

S. 17 of the Court-Fees Act provides that where a suit embraces two or more distinct subjects the plaint shall be chargeable with the aggregate amount of the fees to which the plaint in suits embracing separately each of such subjects would be liable under the Act. Before discussing the question of the stamping of the plaint in respect of the transactions which the plaintiff challenges it is necessary to decide under which provision of the Act the plaint requires to be stamped in respect of the general relief for partition and delivery to the plaintiff of his share. The plaintiff's contention that Art. 17-B of Schedule II applies here is contrary to the majority decision of the Full Bench of this Court (White, C. J., Krishnaswami Aiyar and Ayling, JJ.) in *Rangiah Chetty* v. *Subramania Chetty*[1]. It was

1. (1910) 21 M.L.J. 21 (F.B.).

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there held by White, C. J. and Krishnaswami Aiyar, J., that a suit for partition of joint family property where the plaintiff is in joint possession with the other coparceners is governed by S. 7, cl. (*iv*) (*b*) and that therefore the plaint in such a suit should be stamped *ad valorem* on the amount at which the relief sought is valued Ayling, J., dissented and held that the case fell within Art. 17 (*vi*) of Schedule II which is now Art. 17-B of the Madras Court-Fees (Amendment) Act, 1922. The latter Act made extensive amendments in the Court-Fees Act of 1870 in certain other respects. The opinion of White, C. J. and Krishnaswami Aiyar, J., is not shared by any other Indian High Court. The Calcutta High Court has applied Art. 17 (*vi*) of Schedule II. (See *Kirty Churn Mitter* v. *Aunath Nath Deb*[1], *Bidhata Roy* v. *Ram Charitra Roy*[2], *Rajani Kanta Bag* v. *Rajabala Dasi*[3] and *Nandalal Mukherjee* v. *Kalipada Mukherjee*[4].) The Allahabad and the Lahore High Courts are of the same opinion. (See *Tara Chand Mukherjee* v. *Afzal Beg*[5] and *Asa Ram* v. *Jagan Nath*[6].) The Bombay High Court has held that even where the plaintiff is in joint possession of the family property the provisions of S. 7 (*v*) should be applied. (*Balwant Ganesh* v. *Nana Chintamon*[7] and *Dagdu* v. *Totaram*[8].) It is true that in *Motibhai* v. *Haridoss*[9], S. 7 (*iv*) (*b*) was applied, but in *Dagdu* v. *Totaram*[8], an attempt was made to distinguish the former decision and it cannot be regarded as representing the Bombay view. The question having been raised we must consider whether *Rangiah Chetty* v. *Subramania Chetty*[10], was correctly decided.

S. 7 (*iv*) (*b*) says that suits to enforce the right to share in any property on the ground that it is joint family property shall be stamped according to the amount at which the relief sought is valued in the plaint. The reasons for the majority view in *Rangiah Chetti* v. *Subramania Chetty*[10] are to be found in the judgment of Krishnaswami Aiyar, J., in which White, C.J., concurred. The reasons given by Krishnaswami Aiyar, J., can be shortly stated in this way. It would not be likely that the Legislature in enacting a measure with regard to court-fees

1. (1882) I.L.R. 8 Cal. 757.
2. (1907) 6 C.L J. 651.
3. (1924) I.L.R. 52 Cal. 128.
4. (1931) I.L.R. 59 Cal. 315.
5. (1911) I.L.R. 34 All. 184.
6. (1934) I.L R. 15 Lah. 531 (F.B.).
7. (1893) I.L.R. 18 Bom. 209.
8. (1909) I.L R. 33 Bom. 658.
9. (1896) I L R. 22 Bom. 315.
10. (1910) 21 M.L.J. 21 (F.B.).

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would have omitted to make specific provision for such a common form of suit as a suit for partition by a member of a joint Hindu family and the Privy Council had applied a clause similarly worded in the Limitation Act of 1859 to such suits. The clause referred to in that Act is cl. 13 of S. 1, which fixed a period of twelve years for suits to enforce the right to share in any property movable or immovable on the ground that it is joint family property. Ayling, J., agreed with the opinion expressed in *Dagdu* v. *Totaram*[1], that a suit to recover by partition a definite and ascertained share of a specified property could not fall under S. 7 (*iv*) (*b*), but he did not accept the Bombay view that S. 7 (*v*) was the appropriate section. He accepted the decision in *Kirty Churn Mitter* v. *Aunath Nath Deb*[2], as embodying the correct view. In that case Garth, C. J., observed that it was impossible to say what would be the value to the plaintiff of the change in the nature of his property. A partition suit changes the form of enjoyment of the property. Instead of an undivided share the plaintiff claims a divided share. Ayling, J., agreed that it was impossible to estimate in money the value of such a suit. In this connection it may be mentioned that in *Gill* v. *Varada Raghavayya*[3], Wallis, C. J. and Sadasiva Aiyar, J., held that a suit for partition of immovable property by a person who alleged that he was in possession of it as co-tenant on behalf of himself and others was governed by Art. 17 (*vi*) of Schedule II (now Art. 17-B) because the value of the subject-matter was not capable of valuation.

The Bombay High Court stands alone in its application of S. 7 (*v*). That section says that in suits for the possession of land, houses and gardens the stamp fee shall be paid according to the value of the subject-matter, and states how that value shall be arrived at. In my opinion this sub-section cannot be deemed to apply to a partition suit where the plaintiff is in joint possession. A joint owner who is in possession does not need to sue for possession. He has possession and the fact that his possession is shared by others does not affect the position. I consider that S. 7 (*v*) can only apply where the plaintiff is seeking relief in respect of immovable property when he is out of possession.

1. (1909) I.L.R. 33 Bom. 658. 2. (1882) I.L.R. 8 Cal. 757.
3. (1919) 38 M.L.J. 92: I.L.R. 43 Mad. 396.

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If S. 7 (*v*) is ruled out the only other provisions of the Court-Fees Act which call for consideration are S. 7 (*iv*) (*b*) and Art. 17-B of Schedule II. The language of S. 7 (*iv*) (*b*) is, however, incompatible with a claim for partition when the plaintiff is in joint possession, with the other members of his family. A suit to enforce a right *to share* in any property on the ground that it is joint family property is a suit of a different nature from a suit to enforce the right to *a share*. Where the claim is *to share*, it implies that the plaintiff is not in possession; whereas a suit to obtain possession of *a share* is compatible with the plaintiff being in joint possession of the whole.

With regard to the reasoning of Krishnaswami Aiyar, J., based on S. 1, cl. 13 of the Limitation Act of 1859, it falls to be observed that the wording of this clause was changed by the Limitation Act of 1871 and that the change has been maintained in the Acts of 1877 and 1908. The corresponding Article to S. 1, cl. 13 of the Act of 1859 in the two later acts is Art. 127, which provides a period of limitation of twelve years in respect of a suit by a person excluded from joint family property to enforce a right to share therein. The article now clearly only refers to a suit by a person who is excluded from joint family property. Krishnaswami Aiyar, J., did not think that this amendment made any difference in the interpretation of the article, but in my opinion the alteration of the wording certainly robbed the argument of any force it might have had. As altered its applicability is expressly limited to a case where the member suing is not in joint possession. If the words of S. 7 (*iv*) (*b*) are to be given their ordinary meaning they cannot apply to a suit for partition by a member of a joint family who is still in joint possession. It follows that I consider that the majority decision in *Rangiah Chetty* v. *Subramania Chetty*[1] is erroneous and should be overruled. In these circumstances the only provision in the Court-Fees Act which is applicable is Art. 17-B of Schedule II and in stamping his general relief under this provision the plaintiff acted rightly.

I am unable to accept the plaintiff's contention that he should not be called upon to pay court-fees in respect of any of

1. (1910) 21 M.L.J. 21 (F.B.).

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the transactions which he challenges because he has not asked for specific relief in respect of them. His plaint challenges the validity of transactions entered into by his father as manager of the family, and particulars of these transactions have been supplied. The plaintiff must pay court-fees in accordance with the relief which he is actually seeking. He cannot be allowed to evade payment by omitting to ask for relief when the success of his suit depends on relief being granted to him. The Court must look at the real nature of the suit and decide what the plaintiff is asking for. In this case he is asking for possession of his share in the estate to be calculated after certain transactions have been set aside. Mr. V. V. Srinivasa Aiyangar has rightly conceded that if it is necessary for the plaintiff to ask for relief in respect of any of the transactions he must pay extra court-fee. The plaintiff is in effect asking in respect of alienations where possession has passed to the alienees that they be set aside and that he be placed in possession of his share of the properties alienated. In respect of these transactions the plaintiff clearly has to stamp his relief in accordance with the provisions of S. 7 (*v*). This will apply to items Nos. 4, 11 and 14 of the table set out above.

In respect of decrees passed against him in suits in which he had been *eo nomine* impleaded as a party, it is plain that he must pay the fee prescribed by S. 7 (*iv*) (*a*). Such decrees bind him until set aside, and therefore he cannot seek to obtain a decision on the footing that his interest in the joint family property is not affected by them. It makes no difference that the plaintiff is a minor or merely a junior member of the family, as the considerations which apply to the decree of a competent Court once it is passed, are essentially different from those applicable to the transactions of a party. The plaintiff must be held to have impliedly asked for a cancellation of the decrees passed against him and must accordingly stamp his plaint *ad valorem* on the amount of the decrees and not merely on his share fraction, as his liability is for the full amount, though necessarily limited to the extent of his share in the joint family assets. These remarks apply to items Nos. 9 and 10 in the table.

The other transactions of the first defendant, whether the plaintiff is made a party thereto or not, stand on a different footing. He is not bound under the substantive law by which

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he is governed, to sue for a declaration or cancellation in respect of any of them. The legal position has been correctly explained in *Unni* v. *Kunchi Ammal*[1], in the following words which were taken from an unreported decision of this Court:—

"If a person not having authority to execute a deed, or having such authority under certain circumstances which did not exist, executes a deed, it is not necessary for persons who are not bound by it to sue to set it aside, for it cannot be used against them. They may treat it as non-existent and sue for their right as if it did not exist."

The same principle has been distinctly laid down by the Privy Council in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[2], where their Lordships point out the jural basis underlying such transactions. In that case the reversioner sued for a declaration that a lease granted by the widow of the last male owner was not binding on him and for khas possession. It was objected that the omission to set aside the lease by a suit instituted within the time limited by Art. 91 of the Indian Limitation Act was fatal to the suit. The following observations which are equally applicable to a father or manager of a joint family are apposite:—

"A Hindu widow is not a tenant for life but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Courts, and he shows his election to do the latter by commencing an action to recover possession of the property. There is, in fact, nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir. It is true that the appellants prayed by their plaint a declaration that the ijara was inoperative as against them as leading up to their prayer for delivery to them of khas possession. But it was not necessary for them to do so, and they might have merely claimed possession leaving it to the defendants to plead and (if they could) prove the circumstances which they relied on for showing that the ijara or any derivative dealings with the property were not in fact voidable but were binding on the reversionary heirs."

In such cases even if the plaint contains a prayer for a declaration or cancellation, there is good reason for holding it to be one for a purely incidental, but unnecessary relief. As I have indicated there is no such prayer in the plaint, and in the light of the principles explained there is no justification for implying them and then demanding a fee for it. Nor can I see

1. (1890) I.L.R. 14 Mad 26 at 28.

2. (1907) 17 M.L.J. 154: L.R. 34 I.A. 87: I.L.R. 34 Cal. 329 at 333 (P.C.).

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any force in the argument that the position is altered by the joinder in the suit of the parties to the transactions who are interested in supporting them. Whether they are before the Court or not, the Court is bound as between the members of the family to decide which are the debts binding on the family, before directing a division. (Vide *Venku Reddi* v. *Venku Reddi*[1], and *Sat Narain* v. *Sri Kishen Das*[2].) The presence of the third parties would no doubt invest the decision with a finality, but this is scarcely a ground for reading into the plaint a prayer which the member suing is not obliged to seek under the law in the face of the provision in O. 1, r. 10 (2) of the Civil Procedure Code, which permits the name of any person to be included in a suit, whose presence before the Court would enable it effectually and completely to adjudicate upon and settle all questions involved in the suit. I am unable therefore to appreciate the argument that by reason of his impleading the several creditors, the plaintiff must be deemed to have asked for declarations in respect of each of the transactions impugned, and must pay a separate court-fee as regards each one of them.

It follows that in my opinion the plaintiff cannot be called upon to pay any additional court-fee in respect of the transactions challenged other than the transactions described in items Nos. 4, 9, 10, 11 and 14. It will be for the respective defendants to establish their right to rank as creditors in the other transactions when the account is taken. Neither can the plaintiff be called upon to pay a separate court-fee in respect of his prayer for the appointment of a receiver. This relief is entirely of an interlocutory character.

The record will be remitted to the trial Court and the plaintiff will be given an opportunity of stamping his plaint in accordance with this judgment. Notice of this petition was served on the Government Pleader but as the plaintiff has succeeded in part, there will be no order as to costs.

Pandrang Row, J.

Pandrang Row, J.—I agree with my Lord.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I concur in the opinion expressed by my Lord the Chief Justice.

Patanjali Sastri, J.

Patanjali Sastri, J.—I concur in the judgment just delivered by my Lord the Chief Justice.

1. (1926) 52 M.L.J. 387: I.L.R. 50 Mad. 535 (F.B.).
2. (1936) 71 M.L.J. 812: L.R. 63 I.A. 384: I.L.R. 17 Lah. 644 (P.C.).

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Abdur Rahman, J.—I agree with my Lord the Chief Justice in regard to the conclusions at which he has arrived on the various questions involved in this revision except on one and would therefore give my reasons.

Three divergent views have been expressed by different High Courts in regard to the court-fee to be put on a plaint for partition of joint family property where the plaintiff happens to be in joint possession of the same with his coparceners. The Calcutta and Allahabad High Courts have consistently taken the view that the fee in such a case would have to be fixed under Art. 17 (*vi*) of Schedule II to the Court-Fees Act. (Vide *Kirty Churn Mitter* v. *Aunath Nath Deb*[1], *Bidhata Roy* v. *Ram Charitra Roy*[2], *Rajani Kanta Bag* v. *Rajabala Dasi*[3], *Nandalal Mukherjee* v. *Kalipada Mukherjee*[4] and *Tarachand Mukherjee* v. *Afzal Beg*[5].) The Lahore High Court was taking a different view before but has in a recent Full Bench case decided to fall in with the view of the Calcutta and the Allahabad Courts. (Vide *Asa Ram* v. *Jagan Nath* .) The Bombay High Court has been, except in one case, *Motibhai* v. *Haridoss*[7] of opinion that inasmuch as a suit for partition involves a claim for possession, it should be governed by S. 7 (*v*) of the Act. The view adopted in this presidency after the Full Bench decision in *Rangiah Chetty* v. *Subramania Chetty*[8], has been that the fee was to be paid in accordance with the rule contained in S. 7 (*iv*) (*b*) of the Act. In view of this conflict of judicial opinion I referred the revision raising this and three other questions when it came up before me for an authoritative decision by a larger Bench. It was placed before a Full Bench which decided to place this and other questions for a decision by five Judges and this Bench was constituted in consequence.

The questions which arise for determination in this revision are: (*a*) What is the requisite fee payable in cases where a plaintiff asks for partition of family property of which he is or claims to be in joint possession? (*b*) What would be the court-fee payable in respect of a property which a plaintiff has included in his suit for partition but which property has been alienated by a manager of the family and its possession has

1 (1882) I.L.R. 8 Cal. 757.
2. (1907) 6 C.L.J. 651.
3. (1924) I.L.R. 52 Cal. 128.
4. (1931) I.L.R. 59 Cal. 315.
5. (1911) I.L.R 34 All, 184.
6. (1934) I.L.R. 15 Lah. 531 (F.B.).
7. (1896) I.L.R. 22 Bom. 315.
8. (1910) 21 M.L.J. 21 (F.B.).

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passed out of the family? (*c*) Whether it is incumbent upon the plaintiff, if he wishes to get rid of any decrees or alienations to which he was *eo nomine* a party, to sue for their cancellation. If so, what fee would he be liable to pay for that relief? (*d*) Was it essential for the plaintiff to sue for a declaration or cancellation in regard to transactions (decrees or alienations) to which he had not been made a party? Or in other words, would he be justified in ignoring these transactions altogether and claiming partition although he impleads the decree-holder or the alienee, thus desiring to have a final adjudication as between him and them in regard to the binding character of the decrees or alienations? If he is not justified in ignoring these transactions and is bound to ask for a relief, what should he sue for and what is the requisite fee for that relief?

As to the first question, it was conceded by the learned Judges of this Court whose decision prevailed in the Full Bench case *Rangiah Chetty* v. *Subramania Chetty*[1], that the subject-matter in dispute which was nothing but a convenience sought by the plaintiff in the form of his enjoyment, was not capable of being estimated at a money value. They however declined to apply the provisions of Art. 17 (*vi*) to a suit of this nature as they found the second condition necessary for its application to be wanting. They felt that S. 7 (*iv*) (*b*) in terms applied to a suit for partition even when the plaintiff claimed to be in joint possession of the family property and since the provisions of Art. 17 (*vi*) could not be attracted as long as a provision could be found in the Act for a suit of this kind, they held the above-stated article to be inapplicable. There is no doubt that if S. 7 (*iv*) (*b*) applied to a suit of this nature, Art. 17 (*vi*) would have no application. But the question is if S. 7 (*iv*) (*b*) is applicable. It reads as follows:—

"To enforce the right to share in any property on the ground that it is joint family property."

It has to be admitted that the language of this clause is clumsy and has now been repealed in Bengal where a new section has been enacted in its place which provides a fixed fee in suits for partition where the plaintiff is in joint possession of property. The same course has not been adopted in other provinces, although in the interests of the litigant public it might have been properly so. Since the old section of the Act still

1. (1910) 21 M.L.J. 21 (F.B.).

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exists on the statute book, we have to determine if this clause was rightly applied by the learned Judges of the Madras High Court to this class of cases.

It might be stated at the outset that this sub-section is apparently applicable to persons who own joint family property in the sense in which that expression is used in the Hindu Law and could not be applied to persons who are merely tenants-in-common. The only Lahore case which was brought to our notice in which the present section was extended to Muhammadans has been dissented from by a Full Bench of that Court. (Vide *Asa Ram* v. *Jagan Nath*[1].)

As for the words used in S. 7 (*iv*) (*b*), ordinarily the expression 'to enforce the right to share' would convey the meaning that the plaintiff wanted to enforce a right which he had been deprived from sharing and not that he wished to exercise a right which he had been enjoying although in a different form or manner. I am not at present considering cases where a person has not been permitted to enjoy even joint rights in the family property, or in other words where he has been ousted from joint enjoyment of the property, but only those in which he had been enjoying and in regard to which he wished to seek a partition, that is to say, where he wished to enjoy his specific share in the property separately after severing his rights from those of the other members of the coparcenary or joint family as the case may be. In the latter type of cases the plaintiff can only be said to have asked for a change in the mode of enjoyment and it would not be, to my mind, quite correct to say that in seeking this changed mode of enjoyment he was trying to enforce a right to share a joint property, a right which he had been enjoying heretofore without any hindrance by the other members. If a plaintiff has been in joint enjoyment and he does not wish to continue to enjoy the property in that manner, all that he need ask for is, not possession which is already with him, but partition, a relief for which no provision has been specifically made in the Court-Fees Act. The language of the section, if construed grammatically, does not help us in arriving at the result that the provisions of the sub-section were meant to cover cases of partition at the instance of a person who had been in joint enjoyment of the family

1. (1934) I.L.R. 15 Lah. 531 (F.B.).

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property. Let me then examine the reasons given by the learned Judges in the Full Bench decision, *Rangiah Chetty* v. *Subramania Chetty*,[1] for coming to the conclusion that this section was applicable in regard to suits of the nature mentioned therein. The first reason given by them was that the language of the section if it was not construed in the manner suggested, would lead to the startling result, that while provision in regard to, what they call, rare cases (that is, cases where coparceners bring suits for joint possession after being excluded from the enjoyment of or for participation in the profits of the joint property) might be found to have been contained in this sub-section, no provision for common cases, that is, suits for partition by coparceners in possession, would be found to have been made at all. This reasoning would not, with great deference to the learned Judges, justify us in bringing cases within the scope of this sub-section if they would not otherwise fall within it. Where has the very common case of a suit for partition of property owned jointly by a tenant-in-common been, one might well ask, provided under the Act? Is there any reason to hold that while cases of partition by tenants-in-common of property which cannot fall within the expression 'joint family property' should be held to fall under Art. 17 (*vi*) of Schedule II to the Act suits for partition by joint tenants should be deemed to come under this clause? I find none for drawing this distinction.

The second reason given by the learned Judges was drawn by an analogy from the construction placed on similar words by their Lordships of the Judicial Committee and by the High Courts in India occurring in Art. 127 of the Limitation Acts of 1871, 1877 and 1908 or its corresponding provision in the earlier Limitation Act of 1859. (See *Hari* v. *Maruti*[2], *Nilo Ramchandra* v. *Govind Ballal*[3], *Raghu Nath Bali* v. *Maharaj Bali*[4] and *Prithi Pal* v. *Jowahir Singh*[5].) The words of that article in the first column in the present Limitation Act and in its predecessor (Act XV of 1877) read as follows:

"By a person excluded from joint family property to enforce a right to share therein."

It is manifest from the language that this article was meant to apply to a person who was excluded from the joint

1. (1910) 21 M.L.J. 21 (F.B.).
2. (1882) I.L.R. 6 Bom. 741.
3. (1885) I.L.R. 10 Bom. 24.
4. (1885) L.R. 12 I.A. 112: I.L.R. 11 Cal. 777 (P.C.).
5. (1887) L.R. 14 I.A. 37: I.L.R. 14 Cal. 493 (P.C.).

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family property. The same language was employed in Act IX of 1871 with the difference that the "Hindu" was used instead of the word 'person'. This would be of no consequence. In all these Acts of Limitation the period of limitation was to begin from the date when the exclusion became known to the plaintiff. As for Act XIV of 1859, S. 1, cl. 13 contained a provision for suits "to enforce the right to share in any property, movable or immovable, on the ground that it is joint family property". The period prescribed was twelve years and it was to run from the death of the person from whom the property alleged to be joint was said to have descended or from the date of the last payment to the plaintiff or any person through whom he claimed by the person who was in possession or enjoyment of such property on the ground of such alleged share. It would thus be seen that it applied only to persons who were not in joint enjoyment of the property which was claimed to have descended to them from the deceased or to those who did not get their shares of income from the persons who were actually in possession. The provisions contained in the various Limitation Acts were thus not applicable to persons who were in joint enjoyment of the property but to those only who had been excluded from its enjoyment either actually or by non-payment of any income on account of their share. There would have been no difficulty if, in applying the analogy of the construction placed on the words of the Limitation Acts to the language enployed in S. 7 (*iv*) (*b*) of the Court-Fees Act, the same assumption of exclusion could be made here as well; but unfortunately it is not so. It was taken to cover cases where the plaintiff had been in joint enjoyment of family property. If an excluded person wishes to enforce his right against a person in possession, he would necessarily have to establish it before he can be permitted to enforce it and in attempting to enforce his right to share a property, when the right is one of joint enjoyment he must confine his claims to share its enjoyment and cannot ask for its actual participation by getting a share or a slice out of the joint property. It would therefore seem to follow that the demand for a share was not contemplated or in any case covered by this sub-section.

These were the only two reasons given by the learned Judges in coming to the conclusion that S. 7 (*iv*) (*b*) applied

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to a suit for partition by a member of a joint Hindu family in respect of property of which he had been in joint possession with the other members. The other reasons given by them were advanced really to repel the arguments put before them to show that the section was inapplicable. Stress was laid by the Counsel who appeared in the case on the facts that the clause uses the verb 'to share' and not the noun 'share' and on the use of the words 'on the ground that it is joint family property'. They were repelled by Krishnaswami Aiyar, J., who wrote the leading judgment in the Full Bench case, on the ground that the use of the verb instead of the noun was justified as 'until partition no member of a joint Hindu family is entitled to a definite portion of the family estate". As for the use of the expression "on the ground that it is joint family property", it was met by saying that the words could not be construed to mean "on the ground that it is property of a continuing joint family." It may be true that if a person has not communicated his intention to sever himself from a joint Hindu family before he files a suit for partition he would be a member of a joint Hindu family at the time when the suit is instituted. But the moment the plaint is actually presented by him or on his behalf a disruption of the joint family comes into effect and what the plaintiff would be entitled to, and that is plainly the object of his suit which is one for partition, is a share in the joint family property. He cannot, after a severance has taken place, ask to share the joint family property but only for a share in that property. It goes without saying that as soon as a severance in status takes place in the eye of law, the property does not retain the character, which it had before partition, of joint family property. Hence in a suit for partition the property, although undivided, cannot continue to be described to be that of a joint family. It would be thus clear that in a suit for partition—whatever be the plaintiff's status before suit—his share must be held to be definite after its institution and he must be held to be claiming a share in the property which was once joint family property and not to share the property on the ground that it is joint family property. I am therefore of opinion that S. 7 (*iv*) (*b*) could not be held to apply to a suit for partition instituted by a member of a joint Hindu family against the other members when the former was in joint enjoyment of the property.

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The question then is whether S. 7 (*v*) as held by the Bombay High Court in *Balwant Ganesh* v. *Nana Chintamon*[1] and *Dagdu* v. *Totaram*[2], is applicable to the facts of this case. The facts have not been very clearly stated in these cases and it is not possible to say whether the plaintiffs were in joint possession of the property on the dates on which those suits were instituted. If they were in possession or claimed to be so we would have to say, with very great respect to the learned Judges who decided those cases, that sufficient weight was not given by them to that fact. If a plaintiff is required in cases where he has been in joint enjoyment of property to pay court-fee as he would be when suing for possession, it would follow that his joint possession of the property which he has had at the time of the suit has been wholly ignored and at all events regarded of no consequence or value. If the view was taken in cases even when the plaintiff was in joint enjoyment, it cannot be supported. If the plaintiffs were on the other hand out of possession on the date on which they had filed these suits, they were rightly required to pay a court-fee under S. 7 (*v*).

S. 7 (*iv*) (*b*) and S. 7 (*v*) have been found to be inapplicable. There is no other provision in the Court-Fees Act which would cover suits of this nature. If the convenience which the plaintiff desires in having his share partitioned is incapable of being estimated at a money value, as it undoubtedly is the only article applicable to a suit of this kind would be Art. 17 (*vi*) or Art. 17 (*b*) as enacted in Madras.

The second question presents no difficulty. If the plaintiff was not in possession, either actual or constructive, of the property at the time when he instituted the suit, the provisions contained in S. 7 (*v*) of the Court-Fees Act would apply and he would have to pay court-fee in accordance with rules contained therein. Of course it is the allegation of the plaintiff himself which is material in this respect. But the plaintiff on his own showing was not in possession of some of the properties such as those which were sold or given under a usufructuary mortgage.

As for the third question a perusal of the plaint would show that the plaintiff, after referring to a large number of transactions in paragraphs 6, 7 and 8 of the plaint and after

1. (1893) I.L.R. 18 Bom. 209. 2. (1909) I.L.R. 33 Bom. 658.

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alleging that the debts contracted by the first defendant, who was the plaintiff's father, were wholly for speculative objects and that the family enjoyed no benefit at all from the debts borrowed by him, asserted in paragraph 13 of the plaint that the alienations made by him in favour of defendants were null and void and did not bind the plaintiff's share in the joint family property. The plaintiff was ordered by the trial Court to furnish a statement of the various transactions which he wished to impugn and this was submitted by him. A perusal of this statement shows that he has impugned decrees for money to which he was a party and certain alienations of joint property some of which have passed out of the family's possession. It has not been shown in this statement whether the mortgages executed by defendant 1 as a father or manager of the family describe the plaintiff *eo nomine* to be a party to those documents. But the lower Court holds that he was made a party to some of them. The mortgagees, the decree-holders and the creditors have been impleaded as parties to the suit and although the plaintiff has asked for no specific relief and has contented himself with the prayer that an account of the movable and immovable joint family properties be taken yet it is obvious, that if the Court must have regard to the substance of the thing and not to the mere form in which the relief has been prayed for the plaintiff must be, in formulating his relief in that manner, taken to have asked for the questions of the binding nature of these alienations, decrees and debts to be adjudicated finally in this suit. If the plaintiff was *eo nomine* a party to the decrees as he is shown to be or any of the mortgages it would be incumbent upon him to ask the Court to go into the question whether they were binding on him. Unless that is done the Court would be fully justified in assuming a decree to have been rightly passed against the plaintiff or an alienation to have been *prima facie* properly effected on his behalf by his father. I am not concerned just now with any question of burden of proof and consider it to be irrelevant for this purpose. If the plaintiff wishes to get rid of the decrees or alienations to which he was made a party, he must ask for a specific relief in regard to these transactions. The question then is as to what that relief should be. Not only has a cancellation of the whole of the decree or document been provided for in S. 7 (*iv*) (*a*) (Madras Amendment) of the Court-Fees Act but the amendment covers cases

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where a plaintiff wishes to have a part of the decree or other document cancelled. In the presence of this provision, it is impossible to come to any conclusion other than that the plaintiff must sue in such cases for cancellation and pay a court-fee in accordance with the rule contained in S. 7 (*iv*) (*a*) of the Court-Fees Act.

The last question to be decided is in respect of transactions or decrees to which the plaintiff was not *eo nomine* a party. It has been argued and not without some force that the plaintiff may well ignore decrees passed against or instrument executed by a member of the family even though that member be his own father and manager of joint family and that he could ask for a partition of the property without having any regard to such alienations and could insist that no funds need be reserved at the time of partition for payment to such decree-holders. The argument would have been unassailable if the plaintiff had not impleaded such alienees or creditors in the suit and had not asked for a decree for accounts. The course adopted by him suggests that he wanted the Court to go into these questions and adjudicate on them once and for all. If the plaintiff desired the Court to go into these questions and prayed for a relief which must in the circumstances be taken to be as tantamount to asking for an adjudication of the questions relating to his liability for the decrees passed against his father or to the binding nature of the alienation of family property; there is no reason why he—the plaintiff should not pay a court-fee in regard to them. He may not have been liable to pay any court-fee if such an objection was raised by one of the defendants and the Court had impleaded a creditor or an alienee at the defendant's suggestion and had gone into that question or even when he, that is, the plaintiff himself had impugned a debt or a transaction but had not impleaded the creditor or the alienee. These can be explained however on different grounds. In the first case the plaintiff cannot be held liable to pay as the matter would have to be gone into at the instance of the defendant and in the second case, the matter would be decided as between the parties to the partition suit only. Naturally the alienee or the creditor would not be bound by that decision in that case and cannot take advantage of it even if it is settled in his favour although in his absence. In such cases the plaintiff cannot be said to have asked for any final adjudication of these questions

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except for purposes of partition and is not liable to pay the court-fee for anything else except for that suit. But when he does ask for this adjudication either expressly or in such a manner that he must be deemed to have asked for these questions to be gone into and finally decided, there is no reason why he should not be required to pay for the relief which he has asked to be given to him. The plaintiff's allegations that the alienations or debts were not binding on him made against the parties whom he had impleaded as defendants can only be attributed to his desire to have final adjudication of these questions as between him and them. In view of these assertions, his prayer for accounts must be taken to be equivalent of a prayer for declaration that these debts and alienations were not binding on the plaintiff. A prayer for declaration cannot be, and I say so with great deference, regarded under the circumstances as either superfluous or even ancillary. A suit for partition in which the plaintiff wants an adjudication against a creditor or an alienee comprises two causes of actions and although permitted by procedure to be included in one suit, it covers two distinct subject-matters, both of which should be paid for. The fact that two periods of limitation are applicable to these causes of action would show that both of them are not only separate but independent. It is unnecessary to say what the result would have been if no such prayer had been made by him at all in the plaint although it is quite possible to conceive that in the absence of an express prayer by him, he might have been taken to have done so and the court-fee demanded as if that prayer had been made by him. In the circumstances of this case he should in my opinion be asked to pay court-fee as for simple declarations under Art. 17 (*a*) (*i*). The prayer for partition cannot in my opinion be considered to be one for consequential relief as the relief for partition cannot be said to directly flow from the declaration although it may be that in the event of such a declaration being granted his share may be augmented to a certain extent. It must not be overlooked that the plaintiff's prayer for the declaration is against the creditors or the alienees while the relief for partition is being asked for by the plaintiff not against them, that is, the creditors or the alienees but against his co-sharers.

K. S. *Petition allowed in part.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE SOMAYYA.

Ramasubramanya Pattar .. *Appellant** (*Respondent-Defendant*)

v.

Karimbil Pati and others .. *Respondents* (*Petitioners-Plaintiffs*).

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Civil Procedure Code (V of 1908), O. 20, r. 12, sub-cl. (3)—"Application" in sub-cl. (3) meaning of—Whether governed by Art. 181, Limitation Act (IX of 1908) – Intention of rule-making authority in amending rules.

The word 'application' in sub-r. (3) of r. 12, O. 20 should be read as meaning a motion entirely free from the mischief of Art. 181 of the Limitation Act.

Where in a suit for recovery of possession of several items of immovable property and for payment of mesne profits, by a decree of 1927 the trial Court dismissed the suit, but on appeal, the trial Court by an order of 1930 having been directed in respect of an item of the properties to hold an enquiry as to past and future mesne profits, the respondents applied to the trial Court to ascertain the mesne profits and the trial Court having done so, the appellants appealed to the first appellate Court raising the question of the application being barred by limitation under Art. 181 of the Limitation Act,

Held, that in adding the sub-cl. (3) to r. 12 the rule-making authority had not in mind an application falling within Art. 181; because, in the first place, it would be contrary to provisions of sub-r. (2) of O. 20, r. 12. Secondly, it would put the litigant successful in the appellate Court in a worse position than a successful party in the Court of first instance. The intention of the addition of the sub-clause must be to obviate the necessity of the decree-holder having to move the appellate Court to pass a final decree after an inquiry into mesne profits made by the Court of first instance at the direction of the appellate Court.

Timmaraju v. *Narasimharaju*, (1927) 54 M.L.J. 665 and *Rama Rao* v. *Sreeramamurthi*, (1936) 71 M L.J. 388, dissented from.

Lachmi Narain Marwari v. *Balmakund Marwari*, (1924) 47 M.L.J. 441: L.R. 51 I.A. 321: I L.R. 4 Pat. 61 (P.C.), relied on.

Observations made drawing attention of the Rule Committee to sub-r.(3) with a view to its being framed in a manner which will leave no scope for misunderstanding.

Appeal against the decree of the District Court of South Kanara in A. S. No. 327 of 1934 preferred against the order of the Court of the District Munsif of Kasargod dated 1st

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* S. A. No. 149 of 1936. 20th October, 1939.

November, 1934 and made in R. I. A. No. 554 of 1934 in O. S. No. 364 of 1926.

P. Govinda Menon for Appellant.

K. Vittal Rao for Respondents.

The judgment of the Court was delivered by

The Chief Justice.—In 1926 the respondents filed a suit in the Court of the District Munsif of Kasargod for the recovery of possession of several items of immovable property and for the payment of mesne profits. By a decree dated 2nd December, 1927, the District Munsif dismissed the suit. An appeal was then filed to the Court of the District Judge of South Kanara. The District Judge held that the respondents were entitled to recover possession of one of the items of property. In respect of that item he directed the trial Court to hold an inquiry as to past and future mesne profits and to pass a decree accordingly. The order of the District Judge was on the 6th November, 1930. On the 30th March, 1934, the respondents applied to the trial Court to ascertain the mesne profits form 31st October, 1925, the date on which the appellant became possessed of the property, to 23rd May, 1932, when he surrendered possession to the respondents in pursuance of the decree of the District Court. The District Munsif held an inquiry and found that there was due to the respondents Rs. 1,173-4-7, which he directed the appellant to pay to them. The appellant filed an appeal before the District Judge and urged that the application was barred under Art. 181 of Schedule II of Indian Limitation Act. The District Judge rejected the contention raised by the appellant that the application was barred by the law of Limitation. The contention was that, inasmuch as more than three years had elapsed between the date of the District Court's decree and the date of the filing of the application, Art. 181 of the Limitation Act applied. The District Munsif's finding on the amount of mesne profits was confirmed and the appeal dismissed. This second appeal is the result and it has been placed before this Full Bench as there is a conflict of authority.

O. 20, r. 12 as it appears in the Code of Civil Procedure reads as follows:—

"(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree—

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(a) for the possession of the property;

(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until—

(i) the delivery of possession to the decree-holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under cl. (b) or cl. (c) a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry."

In 1911 this Court added to r. 12 a third sub-rule which is in these terms:—

"Where an appellate Court directs such an inquiry, it may direct the Court of First Instance to make the inquiry; and in every case the Court of First Instance shall, on the application of the decree-holder, inquire and pass the final decree."

It is said that as the result of the addition of sub-r. (3) it is now obligatory on a decree-holder to file an application asking for an inquiry into mesne profits and for the passing of a final decree, and that Art. 181 of the Limitation Act requires such an application to be made within three years of the preliminary decree.

In *Timmaraju* v. *Narasimharaju*[1], Jackson and Srinivasa Aiyangar, JJ., expressed divergent opinions on this question. The facts there were these: A decree for possession with mesne profits was passed on 3rd February, 1919, by an appellate Court. On the 30th November, 1921, the plaintiff applied to the trial Court for an order determining the mesne profits. He paid batta, but service of the notice was not effected, and, on his failure to pay additional batta, the application was dismissed. On the 6th December, 1922, more than three years after the date of the appellate Court's decree, he applied again for an inquiry into the question of the amount of the mesne profits. Jackson, J., was of the opinion that the application of the 6th December, 1922, was an application within the scope of Art. 181 of the Limitation Act and having been filed three years after the decree, was time barred, but he considered that the plaintiff

1. (1927) 54 M.L.J. 665.

could rely on his application of 30th November, 1921, on the ground that the Court should not have dismissed that application unless in doing so it expressly stated that it was acting in accordance with the inherent powers reserved by S. 151 of the Code of Civil Procedure. Srinivasa Aiyangar, J., agreed that the application was not barred by the law of limitation, but based his decision on firmer ground, namely, that the suit must be regarded as pending until a final decree was passed. He considered that the rule-making authority intended by adding sub-r. (3) to r. 12 that the inquiry should always be ordered on the application of the decree-holder for the ascertainment of mesne profits, but he was not satisfied that the language of the sub-rule was sufficiently apt for that purpose. In other words as the rule stood an application could be made for the ascertainment of mesne profits at any time before the passing of the final decree because the suit was pending until a final decree was passed.

In *Rama Rao* v. *Sreeramamurthi*[1], Beasley, C. J. and Stodart, J., accepted the opinion expressed by Jackson, J., in *Timmaraju* v. *Narasimharaju*[2], that where an application is filed for the ascertainment of mesne profits it falls within Art. 181 of the Limitation Act. Beasley, C. J. and Stodart, J., delivered separate judgments, and although in the judgment of the learned Chief Justice no reference is made to the question, inasmuch as in his judgment Stodart, J., said, "We are clearly of the opinion that Art. 181 applies" it must be taken that the learned Chief Justice concurred in the decision of Stodart, J., on the point.

In the course of the arguments in the present case the Court has been informed that no other High Court has made the addition which this Court has made to r. 12. The High Courts which have considered the question of the wording of r. 12 as it stands in the Code have decided that the rule does not contemplate an application being made for the ascertainment of mesne profits and if an application is made it is not an application governed by Art. 181 as it cannot be regarded as an application in execution, but as a part of the suit itself. (See *Harakhpan Missir* v. *Jagdeo Missir*[3], *Bhatu Ram Modi* v. *Fogal Ram*[4], *Kumar Kamakhya Narayan Singh* v. *Akloo Singh*[5],

1. (1936) 71 M L.J. 388.
2. (1927) 54 M L.J. 665.
3. (1924) I.L.R. 4 Pat. 57.
4. (1925) I.L R. 5 Pat. 223.
5. (1928) I.L.R. 8 Pat. 482.

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Shankar Appaji v. *Gangaram Bapuji*[1] and *Narain Das* v. *Bhagwati Prasad*[2].) It has not been suggested that these decisions have misconstrued r. 12 as it stands in the Code, nor could it with reason be suggested. R. 12 unamended provides that where an order is passed directing an inquiry as to mesne profits a final decree shall be passed in accordance with the result of such inquiry. The fact that the decree-holder thinks it advisable to move the Court to commence the inquiry does not mean that he is making an application within the purview of Art. 181. Whenever he moves the Court, the Court is bound by the rule to inquire and grant the decree-holder a final decree. In such circumstances the application is merely in the nature of a remainder of what is still to be done.

Now does the addition of sub-r. (3) make any difference? For the appellant it is said that the words "in every case the Court of First Instance shall, on the application of the decree-holder, inquire and pass a final decree" have the effect of making an application necessary even where there has been no appeal. This direction obviously cannot apply in a case where the appellate Court has decided to conduct the inquiry itself. Sub-r. (3) does not say that the appellate Court *shall* remand the case to the trial Court; it says that it *may* do so. It may very well be that the appellate Court considers that the inquiry should take place under its own immediate supervision and if it does so obviously an application to the Court of First Instance for an inquiry and the passing of a final decree will not lie. The words "and in every case the Court of First Instance shall, on the application of the decree-holder, inquire and pass a final decree" must necessarily be subject to this limitation, irrespective of any other limitation.

I cannot be persuaded to think that in adding this clause the rule-making authority had in mind an application falling within Art. 181. In the first place, it would be contrary to the provisions of sub-r. (2). In the second place, it would put the litigant who is successful in the appellate Court in a worse position than a successful litigant in the Court of First Instance. Srinivasa Aiyangar, J., in *Timmaraju* v. *Narasimharaju*[3] thought that the rule-making authority had in mind an applica-

1. (1928) I.L.R. 52 Bom. 360.
2. (1933) 32 All. L.J. 86.
3. (1927) 54 M.L.J. 665.

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tion to which Art. 181 applied, though as the result of the use of inappropriate words it had not carried its intention into effect. The intention must be gathered from the words used, and reading r. 12 as it stands amended it seems to me that the intention was to obviate the necessity of the decree-holder having to move the appellate Court to pass a final decree after an inquiry into mesne profits made by the Court of First Instance at the direction of the appellate Court. Certainly sub-r. (3) might have been more happily expressed, but I am not prepared to read the word "application" as meaning an application falling within Art. 181. Before the addition to the rule was made a person who obtained a preliminary decree, whether in the trial Court or on appeal, had the right to a final decree on mesne profits being ascertained, irrespective of time. To take away a right the words used for the purpose must leave no doubt as to the intention. That is certainly not the case here, and I consider that the word "application" in sub-r. (3) should be read as meaning a motion entirely free from the mischief of Art. 181.

On an appellate Court directing a Court of First Instance to make an inquiry into mesne profits the proper course for the Court of First Instance to adopt on receipt of the record from the appellate Court is to fix a date for the appearance of the parties. If the decree-holder does not appear the Court of First Instance has no right to pass a final decree depriving him of the mesne profits awarded by the appellate decree, but should adjourn the matter *sine die*, a course which the Privy Council approved of in *Lachmi Narain Marwari* v. *Balmakund Marwari*[1]. In that case the Patna High Court on appeal made an order for a partition upon certain terms and remitted the case to the Court below for disposal under the decree. The plaintiff did not appear on the date fixed by the Subordinate Judge and the suit was dismissed. Their Lordships pointed out that the plaintiff was put into an intolerable position, not being able to go on with his suit and yet not in a position to bring a fresh suit. Their Lordships were fully sensible of the necessity of leaving Judges in India with ample power of discipline, and means to check neglect and delay, but they said that a proper order in a case like the one before them would be an order adjourning the proceedings *sine die* with liberty to the plaintiff

1. (1924) 47 M.L.J. 441: L.R 51 I.A. 321: I.L R. 4 Pat. 61 (P.C.).

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to restore the suit to the list on payment of all costs and court-fees (if any) thrown away. I do not read sub-r. (3) as an attempt to place a suit in which there has been a decree for possession with mesne profits to be ascertained on a different basis. At the same time I consider that the attention of the Rule Committee should be called to sub-r. (3) with a view to its being framed in a manner which will leave no scope for any misunderstanding.

The appeal fails and is dismissed with costs.

K.C. *Reference answered and appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Prerepa Bhagavat Sastrulu (died) and another .. *Appellants** (*Defendant and his L. R.*)

v.

Saridey Lakshmikantam .. *Respondent* (*Plaintiff*).

Bhagavat Sastrulu v. Lakshmi-kantam.

Hindu Law—Maintenance—Permanently kept concubine—Right to maintenance—If affected by non-existence of children

Practice—Remanding a case merely to give opportunity to both parties to adduce evidence which ought to have been adduced at the trial—Propriety.

A permanently kept concubine of a Hindu may be entitled to maintenance even though she is childless

Obiter dictum of Spencer, J, in *Rama Raja Thevar* v. *Papammal,* (1925) 49 M.L.J. 348: I.L.R 48 Mad. 805 at 810, not followed.

Texts and authorities discussed.

As a general rule it is undesirable to remand a case merely in order to give an opportunity to both parties to adduce evidence which might and ought to have been put before the trial Court; and there is a clear danger that such a remand order may in effect be an invitation to perjury. Where however there was no evidence as to the assets and liabilities of the estate of the deceased paramour, a remand for taking further evidence as to the quantum of the assets and liabilities of the estate was not improper.

Appeal against the order of the Court of the Subordinate Judge of Ellore dated 19th September, 1935, and made in A. S. No. 102 of 1933 preferred against the decree dated 4th July, 1932, and made in O. S. No. 731 of 1929, District Munsif's Court, Tanuku.

V. Govindarajachari, K. Kameswara Rao and *B. S. Ramachandrudu* for Appellants.

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* A. A. O. No. 349 of 1936. 2nd October, 1939.

P. Somasundaram and *S. Ramamurthi* for Respondents.

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The Court delivered the following

JUDGMENT.—This appeal raises a question regarding the right of the permanently kept concubine of a deceased Hindu to claim maintenance when she has not had a child by the deceased. It is a question upon which authority is meagre. The only definite pronouncement is contained in an *obiter dictum* of Spencer, J., at page 810 in the case of *Rama Raja Thevar* v. *Papammal*[1]. The learned Judge was dealing with a case of a claim by a concubine who in fact had a daughter by her deceased paramour. In laying down the conditions upon which a concubine may be entitled to maintenance he observes:

> "Another condition that has been put on the right of a concubine to be maintained is that she should be the mother of illegitimate children,"

quoting as authorities the case of *Khemkor* v. *Umiashankar*[2] and Strange's Hindu Law, Chapter 8, p. 174. The other learned Judge while agreeing generally with the conclusion of Spencer, J., says nothing about the question whether the right of maintenance depends upon the existence of children by the concubine. Turning to the authorities for this pronouncement I find that the case of *Khemkor* v. *Umiashankar*[2], does not lay down any rule that a concubine who has no children is disentitled to maintenance. The judgment is very short and the essential point is found in one sentence which is:

> "We also agree with the Judge in thinking that as the mother of the illegitimate children of Ranchor, that is, as his concubine, she is entitled to maintenance."

The judgment quotes as authority Strange's Hindu Law and West and Buhler. This passage may well be an indication that the essential criterion is not whether the claimant is the mother of illegitimate children but whether she was a regularly kept concubine of the deceased. When we turn to the passage in Strange, Vol. I, page 174 we find the learned author after referring to the rights of illegitimate children to maintenance adds the sentence "the mothers of such children also have a like claim." The contrary proposition that concubines who are not the mothers of illegitimate children have no claim to maintenance is not stated. I have not been able to verify the passage in the old edition of West and Buhler quoted by the learned

1. (1925) 49 M.L.J. 348: I.L.R. 48 Mad. 805.
2. (1873) 10 B.H.C.R. 381.

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Chief Justice in *Khemkor's case*[1]. Turning to the original texts in the Mitakshara upon which the right of a concubine to maintenance is built, we find very little assistance. Chapter II, S. 1, paragraph 27 contains the following:

"It is said by Katyayana 'heirless property goes to the King deducting however a subsistence for the females'."

Then in paragraph 28:

"This relates to women kept in concubinage, for the term employed is 'females'. (yoshid). The text of Narada likewise relates to concubines."

There is nothing in these texts to indicate that the question whether or not a concubine has children has any bearing on her right to maintenance. The learned editor of the latest edition of Mayne's Hindu Law p. 824 points out the lack of authority for the pronouncement of Spencer, J., to which I have referred and expresses the opinion that a barren concubine is entitled to maintenance just as much as a barren widow. In the case of *Bai Nagubai* v. *Bai Monghibai*[2], the Privy Council had occasion to deal at length with the question of the right of a concubine to maintenance, particularly with reference to what is required to bring a concubine within the category of *avarudha stri*. That was a case in which the woman in question had a child and their Lordships do not consider whether the right of maintenance is or is not affected by the existence or absence of children. But they do lay down that a woman may be an *avarudha stri* under modern conditions even if she is not living with the family of her paramour, thus overruling one of the conditions which Spencer, J., accepts as necessary to support the claim of a concubine to maintenance. The argument from silence is, of course, dangerous, but it may be remarked that the judgment contains no reference to any limitation of the right to maintenance to concubines who have children. It seems to me with great respect that the proposition laid down in the *obiter dictum* of Spencer, J., is one which has been constructed on an erroneous inference from the sentence in Strange's Hindu Law and the sentence in *Khemkor's case*[1] to which I have referred, that it is unsupported by any text and that it cannot be held to be authoritative. There is no apparent logical or moral basis for the alleged rule and it has not been shown to have the support of custom. I therefore come to the conclusion that a permanently

1. (1873) 10 B.H.C.R. 381.
2. (1926) 51 M.L.J. 577: L.R. 53 I.A. 153: I.L.R. 50 Bom. 604 (P.C.).

kept concubine of a Hindu may be entitled to maintenance even though she is childless. This disposes of the main question in the present appeal.

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The subsidiary question relates to the propriety of the order of remand. The learned District Munsif did record a finding as to the proper rate of maintenance when holding that the plaintiff was not entitled to maintenance at all. He records however that there is practically no evidence regarding the income of the estate of the deceased paramour of the plaintiff. When hearing the appeal the learned Subordinate Judge found that the plaintiff was entitled to maintenance and having regard to the fact that the plaintiff had got a decree in a connected suit for a certain debt due from the estate of the deceased and that there was another claim for maintenance against the same estate brought by a widow of the deceased which had been remanded for taking further evidence as to the quantum of the assets and liabilities of the estate, the learned Subordinate Judge came to the conclusion that it was desirable to remand this suit also for further evidence on the same point, the evidence in both suits to be taken in common. The parties agreed to the latter course. But it is contended in appeal that there was no justification for the remand having regard to the fact that the amount of maintenance had already been decided on the evidence available by the trial Judge. With some hesitation I come to the conclusion that there are no sufficient grounds for interfering with the remand order. As a general rule it is undesirable to remand a case merely in order to give an opportunity to both parties to adduce evidence which might and ought to have been put before the trial Court; and there is a clear danger that such a remand order may in effect be an invitation to perjury. But in the circumstances of the present case there was something to be said for the remand. The claim for maintenance of the plaintiff and the claim for maintenance of the widow in the connected suit both had to be borne by the estate of the deceased which also had to meet the decree in the present appellant's other suit. In order to arrive at the correct rate of maintenance to the widow and to the concubine it was desirable to consider both claims with reference to the available assets and the demands legitimately made upon such assets. From this point of view there is a good deal to be said for deciding the two maintenance claims contemporaneously after a full enquiry regarding the

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available assets. I do not therefore think it necessary to interfere with the order of remand and I uphold the learned Subordinate Judge's view as to the legality of the plaintiff's claim for maintenance.

In the result therefore the appeal is dismissed with costs.

Leave to appeal granted.

K.S. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD THANKERTON, SIR GEORGE RANKIN AND SIR PHILIP MACDONELL.

Errol Mackay and others .. *Appellants**

v.

Oswald Forbes .. *Respondent.*

P.C. Errol Mackay *v.* Oswald Forbes.

Government of India Act (1935), S. 205—Case raising interpretation of Order-in-Council made under Government of India Act, 1935—Consideration under S. 205 of the Government of India Act, 1935, as to certificate for appeal to Federal Court not mentioned in decree of High Court or in the certificate for leave to appeal to Privy Council—Appeal to Privy Council—Whether competent.

S. 205 of the Government of India Act imposes on the High Court the duty in every case of considering and determining as part of its decree, whether to give or withhold a certificate of fitness for appeal to the Federal Court. That determination whether it involves the granting or withholding of a certificate should be recorded not only for the information of the parties but also for that of the Federal Court or the Board with regard to their jurisdiction to entertain an appeal. A suit was instituted in which an order was sought for appointment of the Official Trustee of Bengal to be trustee of a deceased man's estate under S. 10 of the Official Trustees Act, 1913, which Act was amended by the Government of India (Adaptation of Indian Laws) Order, 1937, made by virtue of S. 293 of the Government of India Act, 1935. Neither from the judgment of the appellate Bench dealing with the suit, nor from the order of the High Court Bench which certified the case as fit for appeal to His Majesty was there any indication whether the Court had considered S. 205 of the Act of 1935. The appeal having come before the Privy Council a preliminary objection was raised that it was incompetent.

Held, that the appeal to His Majesty was incompetent in the absence of a granting or withholding by the High Court of a certificate with reference to S. 205 of the Act of 1935, but that the appellant should be at liberty, if the High Court should subsequently make an order withholding a certificate under the section to apply to His Majesty in Council to have the appeal to His Majesty restored.

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* P. C. Appeal No. 105 of 1938. 10th November, 1939.
Bengal Appeal No. 70 of 1937.

P.C. — Errol Mackay v. Oswald Forbes.

Appeal from a judgment of the High Court at Fort William in Bengal, in its Appellate Jurisdiction dated 11th April, 1938 (Costello and Lort-Williams, JJ.) in part reversing a decision of Panckridge, J., dated 22nd July, 1937.

The facts are fully stated in the judgment of the Board.

Nissim for Respondent.—It is submitted, by way of preliminary objection to this appeal, that it is not competent. The question at issue involves the interpretation of an Order in Council made under the Government of India Act, 1935, S. 205 of which in such a case imposes a statutory duty on the High Court to decide whether or not to grant a certificate of fitness for appeal to the Federal Court. It is submitted that the High Court has omitted to fulfil its statutory duty inasmuch as it has given no indication of whether or not it has considered S. 205. Had it considered the matter it must have held that the case was one to which the section applied, and it would have given a certificate for appeal to the Federal Court.

L. P. E. Pugh, K.C. and *W. K. Page* for Appellants.—There is no necessity for the High Court to give its reasons for granting or withholding a certificate under S. 205. The Court's duty is to consider that question, and it must be presumed to have done its duty and duly considered it. The respondent might prove that the Court had not considered the question, but there is nothing on the record to show that that is the case. Accordingly this appeal should be allowed to proceed.

10th November, 1939. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—This is an appeal from a judgment and order of the High Court of Judicature at Fort William in Bengal, in its civil appellate jurisdiction, dated the 11th April, 1938, which allowed in part the appeal of the present respondent from the judgment and order of the said High Court, in its original jurisdiction, made by Panckridge, J., on the 22nd July, 1937.

The respondent raises a preliminary point as to the jurisdiction of this Board to entertain this appeal in view of the provisions of S. 205 of the Government of India Act, 1935, which provides as follows:—

"205—(1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the nterpretation of this Act or any Order-in-Council made thereunder, and it shall be the duty of every High Court in British India to consider in every

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case whether or not any such question is involved and of its own motion to give or withhold a certificate accordingly.

"(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave."

This section imposes on the High Court the duty of considering and determining in every case, as part of its judgment, decree or final order, the giving or withholding of the certificate. On such determination the jurisdiction to entertain an appeal from such judgment, decree or final order depends, and, manifestly, such determination, whether it involves the granting or withholding of a certificate, should be recorded, not only for the information of the parties, but—a matter of equal importance—also for the certification of this Board and the Federal Court as to their jurisdiction to entertain an appeal. No such record appears in the present case, nor is there anything to suggest that the matter was considered by the High Court Bench which delivered the judgment and order of the 11th April, 1938. The same is true of the High Court Bench which certified this case as a fit one for appeal to His Majesty in Council on the 15th June, 1938, and which was differently constituted. But, as their Lordships have already indicated, the statutory duty fell to be discharged by the Bench which delivered the judgment and order of the 11th April, 1938.

In the present suit the appellants seek an order for appointment of the Official Trustee of Bengal to be trustee of the estate of one Alexander John Forbes deceased under the provisions of S. 10 of the Official Trustees Act (Act II of 1913), or, alternatively, for appointment of the said Official Trustee under S. 35 of the Indian Trustees Act, 1866. The estate of the deceased consisted partly of immovable property situate outside the Division of Bengal.

The Official Trustees Act, 1913, was amended by the Government of India (Adaptation of Indian Laws) Order, 1937, which was made by virtue of S. 293 of the Government of India Act, 1935, and came into force on the 1st April, 1937. The present writ of summons was taken out on the 5th May, 1937. Panckridge, J., who made the order of the 22nd July,

1937, did not consider the Order in Council of 1937, but it was fully considered by the Appellate Bench (Costello and Lort-Williams, JJ.), and it will be sufficient to quote some short passages from their judgment:—

"We are quite satisfied that had the attention of the learned Judge been drawn to the alteration effected by means of the Order-in-Council his decision would in all probability have been otherwise than what it was. . . . The question whether the Court can appoint the Official Trustee of Bengal as trustee over properties outside the Province seems to depend upon the provisions of S. 3 as amended by the Order-in-Council and S. 10 of the Official Trustees Act. . . . In other words, we think that under the provisions of the Act as it now stands this Court is not entitled to stretch its arms, if I may use the expression, beyond the territorial limits of its jurisdiction. The result is that we think that the order made by Mr. Justice Panckridge cannot stand in so far as it relates to any property not lying or not situate within the territorial jurisdiction of the Court. Mr. Banerji sought to argue that there is ample power in the Court under the general provisions of the Indian Trustees Act. I do not think it necessary to consider that aspect of the matter. This petition was essentially and primarily concerned with the appointment of the Official Trustee as such and the matter is one which quite clearly falls to be decided under the provisions of the Official Trustees Act and that Act alone."

S. 205 of the Government of India Act is not referred to in the judgment. Counsel for the appellants suggested that the Court may have considered this section and decided to withhold a certificate, though that decision is not expressed. The passages quoted above make this unlikely and in the absence of a certificate their Lordships think that the appeal should be dismissed with costs. If, however, the High Court should hereafter make an order withholding a certificate under S. 205, the appellants are to be at liberty to apply to His Majesty in Council to have the present appeal restored. Their Lordships will humbly advise His Majesty accordingly.

With reference to the costs of a petition by the respondent which by the Board's order of the 18th May, 1939, were directed to be paid by him in any event, these will be taxed and set off against the costs that the appellants are by this judgment ordered to pay.

Solicitors for Appellants: *Morgan, Price, Marley and Rugg.*

Solicitors for Respondent: *Ashurst, Morris and Crisp & Co.*

R. C. C. *Appeal dismissed.*

K. S.

PRIVY COUNCIL.

[On appeal from the Court of Appeal at Johore Bahru.]

PRESENT:—LORD THANKERTON, LORD FAIRFIELD AND LORD SALVESEN.

S. R. M. S. Chethambaram Chettiar and another .. *Appellants**

v.

Loo Thon Poo and another .. *Respondents.*

P.C. — Chethambaram Chettiar *v.* Loo Thon Poo.

Interest—Transaction in which interest charged on interest—Existence of ample security—If transaction unfair and open to objection—24 per cent. interest on secured debt—Presumption that it is unfair under Usurious Loans Act (IV of 1937), S. 3.

Where in the suit transactions of loan and charge the interest charged was 24 per cent. per annum and such interest charged at that rate was on each transaction capitalised and made payable by monthly instalments and the transactions were attacked as unfair under the Usurious Loans Act,

Held, where a loan has been incurred for interest and this interest is added to the amount agreed to be due when a new transaction is agreed between the parties which includes the payment of interest as an acknowledged debt this is not in principle open to any sound objection.

Lyle v. *Chappell*, (1932) 1 K.B. 691 at 706 and *Paton* v. *The Inland Revenue Commissioners*, (1938) A.C. 341 at 348, approved.

The charge of 24 per cent. interest per annum should be presumed to be unfair and should be reduced to 15 per cent. compound interest.

Consolidated appeals from the decision of the Court of Appeal at Johore reversing the decision of the trial Judge Mr. Justice Mills.

12th October, 1939. Their Lordships' judgment was delivered by

Lord Fairfield.

LORD FAIRFIELD.—This is a consolidated appeal from the decision of the Court of Appeal at Johore Bahru in the State of Johore reversing the decision of the Trial Judge, Mr. Justice Mills.

It may be convenient to say at once that their Lordships are satisfied that the judgment of the Trial Judge was wrong, that its reversal by the Court of Appeal was right and ought to be affirmed, except in one respect which will be dealt with later in this judgment.

It will save their Lordships the trouble of stating the names of appellants and respondents, where they differ, if they refer to the appellants collectively as the moneylenders and the respondents as the borrowers.

* P. C. Appeal No. 76 of 1938. 12th October, 1939.

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By originating summonses dated 23rd November, 1936, the moneylenders made application to the Court of the Judge at Johore Bahru for an order for the borrowers to show cause why the several rubber estates which had been charged to the moneylenders by certain instruments of charge should not be sold at public auction, subject to the terms stated in each summons.

The borrowers by their affidavit in answer asked the Court to say that the several transactions to which the originating summonses related were usurious and unfair, and that the interest charged was excessive; they also complained that compound interest was charged although there was ample security and they asked for an order that the transactions should be re-opened under the Usurious Loans Enactment.

The borrowers also complained that their signatures to the charges were obtained by undue influence. As this claim was abandoned when the case came before the Court of Appeal it is unnecessary for their Lordships to say anything about it. The loans and charges with which the present appeal is concerned are identified in the evidence by the letters (*e*), (*n*) and (*r*). The borrowers also appealed with regard to loans identified by letters (*o*), (*p*) and (*q*). It was agreed that the loans identified by the letters (*o*), (*p*) and (*q*) should stand or fall by the decision in this appeal with reference to the transactions identified by the letters (*e*), (*n*) and (*r*).

By the Usurious Loans Statute in force at the date of each of the impeached transactions it was provided as follows:—

"(1) where, in any proceeding to which this Enactment applies, whether *ex parte* or otherwise, the Court has reason to believe (*a*) that the interest is excessive and (*b*) that the transaction was between the parties thereto substantially unfair, the Court may exercise all or any of the following powers:—

(1) reopen the transactions, take an account between the parties and relieve the debtor of all liability in respect of excessive interest.

(2) notwithstanding any agreement purporting to close previous dealings and to create a new obligation, re-open any account already taken between them, and relieve the debtor of all liability in respect of any excessive interest and if anything has been paid or allowed to account in respect of such liability, order the creditor to repay any sum which it considers to be repayable."

In all the transactions of loan and charge which fall to be considered in the present appeal the interest charged was 24 per cent. Such interest charged at that rate was on each transaction capitalised and made payable by monthly instalments,

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The only evidence before the Trial Judge which affects the question whether 24 per cent. was or was not excessive and unfair as between the parties consisted of (1) the affidavit of Loo Thon Poo, one of the borrowers, (2) the affidavit of Vaithyalingham, the valuer, which was not contradicted by any affidavit on the part of the moneylenders, and (3) the affidavit of Cheong Hock Chye which also was unchallenged by any affidavit in opposition. In the last-mentioned affidavit, it was stated by the deponent that in the case of trust securities where a loan is not permissible if it exceeds two-thirds of the value of the property charged as at the date of the loan, the rate of interest charged varied from 6 to 9 per cent. simple interest, but was never more than 9 per cent. In the case of other securities it is stated in this affidavit that interest charged had been a little more but not very much more than 9 per cent., both in Singapore and the State of Johore. The facts stated in this affidavit were not challenged by any affidavit in opposition filed by or in behalf of the moneylenders. If this evidence be accepted the inference is plain that where the security is not a trust security the interest usually charged on a fully secured loan in the State of Johore had only been a little in excess of 9 per cent. All the loans and charges with which this appeal is concerned, namely, (*e*), (*n*) and (*r*), were amply secured by charges on rubber estates which had been well looked after and kept in good order.

In their Lordships' opinion the Trial Judge was wrong in concluding that the charge of 24 per cent. interest was not unreasonable and excessive and was not unfair as between the parties. They agree with the Court of Appeal that his decision in this respect was wrong and that the Court of Appeal was right in reversing it. Their Lordships have come to this conclusion for the following reasons:—

(1) The Trial Judge was wrong in treating the reported decisions of the Courts of Johore and India as evidence of the facts and inferences of fact stated in these reports.

(2) The learned Judge failed to give effect to the unchallenged evidence of Cheong Hock Chye as regards the rate of interest usually charged in the state of Johore.

(3) The learned Judge failed to attach sufficient weight to the consideration that in all cases the loans were amply secured.

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(4) In considering whether the several transactions with which the proceedings before the Trial Judge were concerned were substantially unfair between the parties the Trial Judge failed to consider and give effect to the fact that in all these transactions the contract contained a very harsh term giving power to the moneylenders to enforce payment of the loan and interest, if any instalment became due and unpaid.

Their Lordships are accordingly of opinion that the judgment of the Court of Appeal was right, except in so far as it required the interest throughout to be reckoned as simple interest.

Their Lordships also think it right to make some observations on one of the passages contained in the judgment of the Court of Appeal. In the second paragraph of page 55 of the record the Acting Chief Justice in delivering the oral judgment of the Court of Appeal said:

" Before us Counsel agreed that in Johore 18 per cent. was in the past quite a common rate of interest on charges, but now by Enactment No. 4 of 1937, which came into force on the 16th March, 1937, S. 3 of the Usurious Loans Enactment, it is provided that until the contrary is proved, if the interest exceeds 12 per cent. per annum in the case of secured, and 18 per cent. per annum on unsecured loans, the Court shall presume that the interest charged is excessive and the transaction substantially unfair."

Before the Trial Judge the borrowers' Counsel said: "We submit to 18 per cent. because it is the highest allowed but the Court may think it too much." It seems probable that the Counsel for the borrowers in the Court of Appeal meant no more than what he had stated in the argument before the Trial Judge. Even if this be an incorrect interpretation of what Counsel said in the Court of Appeal it does not follow that because 18 per cent. had been in the past quite a common rate of interest on charges it could not be regarded as excessive and unfair, it is not unusual for borrowers to submit to a rate of interest which is excessive and unfair rather than run the risks of litigation, including it may be the risk of having to incur the expense of an appeal to His Majesty in Council. If by the words quoted above the Court of Appeal meant that the enactment of 1937 should be used to construe the earlier enactment they were certainly wrong, but they may merely have meant to use the later statute as some evidence that 24 per cent. was considered excessive by a representative section of the Protectorate,

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in which case their observations quoted above would not be liable to serious criticism.

Their Lordships ought now to consider the evidence relating to the several loans and charges with which this appeal is concerned in order to determine on which of these transactions the question arises whether the charge of compound interest, that is to say interest on interest, ought to be allowed. In the case of the transaction of loan and charge identified as (*e*) the amount of cash paid to the borrowers by the moneylenders was £3,000, the capitalised interest was £600 payable by monthly instalments. No part of the capital or capitalised interest on this loan was paid by the borrowers. These sums, whether capital or interest, were included in loan (*f*) and again in loan (*g*); and in loan (*n*) a balance of interest on (*e*) was included as still undischarged. The evidence relating to all transactions by way of loan and charge are conveniently summarised in exhibit C, Schedule A, which is to be found on pages 88 and 89 of the record. No. 5 in this schedule relates to transaction (*e*), No. 11 relates to transactions (*l*), (*m*) and (*n*) and No. 12 to transactions (*o*), (*p*), (*q*) and (*r*). It is clear that transactions (*l*), (*m*) and (*n*), and (*o*), (*p*), (*q*) and (*r*) included interest charged on interest.

Their Lordships are of opinion where a loan has been incurred for interest and this interest is added to the amount agreed to be due when a new transaction is agreed between the parties which includes the payment of interest as an acknowledged debt this is not in principle open to any sound objection. As one member of this Board, when sitting in the Court of Appeal, pointed out in the case of *Lyle* v. *Chappell*[1], it ought not to make any difference to the validity of a transaction by way of a renewal of a loan, whether the parties go through the form of payment by the borrower of the whole amount due and a re-lending of the same amount by the moneylender, or the transaction is carried out without any such payment by treating the amount of principal and interest still due as a debt acknowledged by the borrower together with an undertaking by the borrower to pay the amount of the agreed debt.

That this view is right in principle is confirmed by the following passage in the speech of Lord Atkin in *Paton* v. *The*

1. (1932) 1 K.B. 691 at 706

Inland Revenue Commissioners[1], where his Lordship used these words in relation to a case involving six monthly settlements:

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"If you settle that is agree the balance at the end of six months there is nothing to prevent your making a fresh start with the total debt which no doubt includes interest and agreeing to forbear from suing for the whole debt at a rate of interest meantime."

Their Lordships do not fail to bear in mind that English decisions are not binding either in fact or in law on a question arising in an appeal from a judgment in the State of Johore. Nevertheless, the reasoning of judges in the English Courts may prove helpful in solving a similar problem arising in that State. It is only in this sense that their Lordships rely in the authorities referred to above.

The appellants cited the decision of Channell, J., in *Carringtons Ltd. v. Smith*[2], in support of their appeal, and the qualified approval of that decision by the Court of Appeal in *Reading Trust and Spero*[3]. It is apparent from the judgment of Lord Fairfield (then Lord Justice Greer) and from that of Lord Justice Slesser, that Channell, J., was right in taking into account the fact that a willing and intelligent borrower had agreed to the interest charged, but that this was only one of the circumstances to be taken into account and was not of itself conclusive.

Their Lordships are not satisfied by the evidence in the present case that the borrowers fully understood what they were agreeing to, and in any case their Lordships are of opinion they ought not to disturb the finding of the Court of Appeal that 15 per cent. interest was the right interest to allow under all the circumstances proved at the trial.

Their Lordships are of opinion that the order of the Court of Appeal in so far as it relates to the three transactions (*e*), (*n*) and (*r*) with which alone this appeal is concerned, should be affirmed. The order made by the Court of Appeal was as follows:—

"These appeals coming on for hearing this 5th day of April, 1937, before the Honourable Mr. Justice Howes, Acting C.J.S.S. The Honourable Mr. Justice Horne and the Honourable Mr. Justice Laville in the presence of the Honourable Dato Roland Braddel and Mr. S. C. Goho of Counsel for the Appellants-Chargors and the Honourable Mr. R. Williamson and Mr. M. V. Pillai of Counsel for the Respondents-Chargees and all parties having agreed to hear both appeals as one appeal, upon reading the Memorandum of Appeal

1. (1938) A.C. 341 at 348.
2. (1906) 1 K.B. 79.
3. (1930) 1 K.B. 492.

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filed herein and what was alleged by Counsel it is ordered that the appeal do stand for judgment and this appeal standing for judgment this 1st day of May, 1937, in the presence of Mr. S. C. Goho and Mr. C G. Toh of Counsel for the Appellants-Chargors and Mr. M. V. Pillai of Counsel for the Respondents-Charges and THIS COURT being of the opinion that interest charged by the Chargees in respect of the advances made to the Chargors herein was excessive and usurious under all the circumstances of the case and also being of the opinion that the judgment of the trial Judge dated the 28th of January, 1937, given herein was wrong doth hereby allow this appeal and set aside the Order of the trial Judge mentioned above and doth declare that all the transactions and accounts whatsoever, arising as from the 18th June, 1927, Between the Chargors (Appellants) and the Chargees (Respondents) ought to be re-opened and set aside, and that the Chargors (Appellants) ought to be relieved from payment of any sum in excess of the sums actually advanced by the Chargees to the said Chargors and interest thereon at the rate of 15 per cent. per annum simple interest; and that if any excess has been paid by the Chargors, the Chargees ought to repay the same to the Chargors; and the Court does order and judge the same accordingly. And it is ordered that the following account be taken, that is to say, an account of all sums actually advanced by the Chargees to or for the use of the Chargors on and from the 18th June, 1927, and of all sums received by the Chargees from the Chargors in respect of any such advance, and that on taking such account the Chargors be charged with interest at the rate of 15 per cent. per annum (simple interest) on the sums from time to time owing to the Chargees; and that the balance due from either party to the other be certified. And if any sum is found due to be paid by the Chargors to the Chargees such sums shall stand charged upon the lands of the Chargors now charged to the Chargee, in the same proportion as the amounts now charged on the said lands are distributed thereon, and such sums shall carry interest at the rate of 12 per cent. per annum until payment. And if the amount so certified and the interest due thereon is not paid on or before the 31st July, 1937, the said lands shall be sold by public auction, under the direction of the Court, with liberty to apply for such direction as may be necessary.

Their Lordships are only concerned with the loans and charges identified by the letters (*e*), (*n*) and (*r*); so far as these transactions are concerned their Lordships are of opinion that the order of the Court of Appeal should be affirmed, but varied by striking out the words "simple interest". This will have the effect of making the charge of 15 per cent. payable on the sums from time to time acknowledged to be owing by the borrowers to the lenders and will thus be allowing interest on interest contrary to the views expressed by the Court of Appeal in their judgment, and their Lordships will humbly advise His Majesty that the appeal should be dismissed subject to the variation with regard to interest already mentioned.

With regard to the costs, their Lordships are of opinion that the costs of the appeal to His Majesty will be reasonably

met by an order allowing the respondents' nine-tenths of their costs, and their Lordships will advise His Majesty accordingly.

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K.S. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD MACMILLAN, SIR GEORGE RANKIN AND MR. M. R. JAYAKAR.

Probodh Kumar Das and others .. *Appellants**

v.

The Dantmara Tea Co., Ltd. and others .. *Respondents.*

P.C.

Probodh Kumar Das v. Dantmara Tea Co., Ltd.

Transfer of Property Act (IV of 1882), S. 53-A—Contract of sale without conveyance—Payment of an instalment and taking possession by assignee of contract—Subsequent duly registered sale deed by original vendor in favour of stranger—Suit by transferee in possession for declaration that subsequent transferee had no title to the property—Maintainability

A company bought an estate at auction but obtained no conveyance of it to themselves, and then by letters of offer and acceptance agreed to sell the estate to *R* who paid the first instalment of the price and entered into possession. In 1934 the company executed a deed, which was duly registered, assigning the estate to the defendants. That deed recited that *R* had failed to complete his contract of sale in respect of the property. On the same date, a deed of sale of the property, duly registered, was also executed in favour of the defendants. The plaintiffs, persons claiming title through *R*, having brought an action for a declaration that the defendants had no title to the estate as against the plaintiffs.

Held, the right conferred by S. 53-A of the Transfer of Property Act is a right available only to a defendant to protect his possession, and it confers no right of action on a transferee in possession under an unregistered contract of sale and that the suit was not maintainable.

Appeal from a judgment of the High Court at Fort William in Bengal, dated 18th August, 1936 (Mitter and Ghose, JJ.), reversing a judgment of the Second Additional Subordinate Judge, Chittagong, dated 31st January, 1935.

The facts and arguments appear sufficiently from the judgment.

Sir Thomas Strangman K. C. and *C. Bagram* for Appellants.

A. M. Dunne, K.C. and *J. M. Pringle* for the Dantmara Co.

L. P. E. Pugh, K. C. and *J. M. Pringle* for other Respondents.

10th October, 1939. Their Lordships' judgment was delivered by

LORD MACMILLAN.—This appeal relates to a tea garden in the district of Chittagong, known as the Kaiyacherra Tea Estate, Lord Macmillan.

* P. C. Appeal No. 86 of 1938. Bengal Appeal No. 47 of 1936. 10th October, 1939.

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which at one time belonged to the Kaiyacherra Tea Company, Limited. The estate was mortgaged to Messrs. Gillanders, Arbuthnot & Co. of Calcutta who in 1930 obtained an order for the compulsory winding-up of the Tea Company. Thereafter the estate was put up to auction by the liquidators and purchased by Messrs. Gillanders, Arbuthnot & Co. Without obtaining any conveyance in their favour Messrs. Gillanders, Arbuthnot & Co. on 10th October, 1931, by an interchange of letters of offer and acceptance agreed to sell the estate to one S. N. Roy, who paid the first instalment of the price and entered into possession. No conveyance was ever executed in pursuance of this contract of sale but the plaintiffs in the present suit, now the appellants, claim to have acquired at least in part the purchaser's rights under it. The estate has been the subject of a complicated series of transactions which it is fortunately not necessary to detail for the purpose of deciding the only question argued before their Lordships. These transactions are fully set out in the judgments of the Subordinate Judge and the High Court and account for the varied assortment of defendants to the suit.

The first defendants and respondents, the Dantmara Tea Company, Limited, to whom alone it is necessary to refer, claim on the other hand to be the proprietors of the estate under (1) a duly registered deed of assignment in their favour by the partners of Messrs. Gillanders, Arbuthnot & Co., dated 1st June, 1934, which narrates *inter alia* the failure of S. N. Roy to complete the contract of sale of 10th October, 1931, and (2) a duly registered deed of sale, also dated 1st June, 1934, by the Kaiyacherra Tea Company, Limited, and the liquidators of that company and by the partners of Messrs. Gillanders, Arbuthnot & Co.

The position accordingly is that the plaintiffs have no title to the estate of which they are at least partly in possession, but rely on the contract of sale of 10th October, 1931, while the defendants, the Dantmara Tea Company, Limited, have a duly completed title to the estate but are not in possession of it.

The real bone of contention between the parties is the right to the export quota under the India Tea Control Act (XXIV of 1933), which was passed *inter alia* to regulate the export of tea from India. By S. 3 of that Act an Indian Tea Licensing Committee was set up and under other provisions of

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the Act it was entrusted with the task of determining the total quantity of tea, termed the "export quota," which the owner of each tea estate should be permitted to export, and of issuing export licences. These quota rights are assignable and are of obvious value. The licensing Committee in 1933-34 issued the export quota rights for the Kaiyacherra estate to the plaintiffs or to them and S. N. Roy. In 1934-35 the Committee, having become aware that the title to the estate was in dispute, declined to issue any export quota rights in respect of it. Subsequent to the execution and registration of the conveyance of the estate to the defendants, the Dantmara Tea Company, Limited, the Licensing Committee have recognised them as entitled to the export quota rights of the estate. Thus the plaintiffs have in part at least possession of the estate but have no export quota rights, while the defendants, the Dantmara Tea Company, Limited, hold the export quota rights of the estate but have not possession of it.

It is in these circumstances that the plaintiffs brought the present suit in which they seek to have it declared that the Dantmara Tea Company, Limited, and others have no right or title to the estate and are debarred from enforcing any right to the estate, including the right to sell tea under the export quota allotted to it or to transfer the quota rights to any person. They also seek an injunction.

The defendants challenged the right of the plaintiffs to bring the suit and maintained that they had no title to sue. The Subordinate Judge rejected this plea and decided generally in favour of the plaintiffs but on appeal the learned Judges of the High Court were of opinion that the suit was not maintainable and dismissed it.

It was conceded by the appellants at their Lordships' bar that, apart from S. 53-A which was added by amendment in 1929 to the Transfer of Property Act, 1882, they had no case. But they contended that, notwithstanding that they had not chosen to sue for specific performance of the contract of 10th October, 1931, and notwithstanding that they had taken no steps to complete their title, they were nevertheless entitled under S. 53-A actively to assert the rights of a proprietor in virtue of the contract of 10th October, 1931, and their possession.

The position of the law under the Transfer of Property Act, 1882, before the addition to it of S. 53-A has on more

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than one occasion been expounded by their Lordships and reference may be made to the case of *Pir Bakhsh* v. *Mahomed Tahar*[1], where the subject was fully discussed. It is clear that the appellants were well-advised in conceding that if they could not invoke S. 53-A they were out of Court.

In their Lordships' opinion the amendment of the law effected by the enactment of S. 53-A conferred no right of action on a transferee in possession under an unregistered contract of sale. Their Lordships agree with the view expressed by Mr. Justice Mitter in the High Court that "the right conferred by S. 53-A is a right available only to the defendant to protect his possession." They note that this was also the view of their late distinguished colleague, Sir Dinshah Mullah, as stated in the second edition of his treatise on the Transfer of Property Act at p. 262. The section is so framed as to impose a statutory bar on the transferor; it confers no active title on the transferee. Indeed, any other reading of it would make a serious inroad on the whole scheme of the Transfer of Property Act.

It was suggested that by obtaining the export quota rights from the Licensing Committee the Dantmara Tea Company, Limited, as persons claiming under the transferors, were enforcing a right in respect of the property against the appellants as persons claiming under the transferee, and could be enjoined at the appellants' instance from so doing, but in their Lordships' view there has been no enforcement within the meaning of the section of any right against the appellants.

Their Lordships will accordingly humbly advise His Majesty that the appeal be dismissed. Separate printed cases were presented on behalf of the respondents, the Dantmara Tea Company, Limited, and the respondents, the Chandranagar Tea Company, Limited, who claimed to have acquired an interest in the estate, and were separately represented at their Lordships' bar, but the appellants will pay only one set of costs to the respondents.

Solicitors for Appellants: *Callingham, Ormond and Maddox.*

Solicitors for Respondents: *T. L. Wilson & Co.*

R. C. C. *Appeal dismissed.*

K. S.

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1. (1934) 67 M.L.J. 865: L.R. 61 I.A. 388: I.L R. 58 Bom. 650 (P.C.).

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KRISHNASWAMI AIYANGAR. AND MR. JUSTICE PATANJALI SASTRI.

Sivaprasad Sowcar .. *Appellant** (*Plaintiff*)

v.

Sekharamantri Narasimhamurthi and others .. *Respondents* (*Defendants*).

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Survey and Boundaries Act (IV of 1897), Ss. 11, 12, 13 & 14—Effect of Survey Officer's decision—Adverse possession of unsuccessful party whether affected by decision of Survey Officer—Computation of period of 12 years for limitation, how calculated in the circumstances—Limitation Act (IX of 1908), Art. 144.

An order of the Survey Officer under S. 11 or of the Appellate authority under S. 12 of the Survey and Boundaries Act (IV of 1897) in itself has not the effect of causing a break in the continuity of the adverse possession held by the unsuccessful party so as to preclude his making use of his prior possession to make up the period of twelve years required by the Limitation Act to complete his title.

Pogaru Ramamurthi v. *Sri Rajah Mirja Sri Pushavati Alaka Narayana Gajapathriaju Maharaju Manya Sultan Bahadur*, (1932) 64 M.L.J. 361: I.L.R. 56 Mad. 366; *Penumatche Seetharamaraju* v. *Kalidindi Narayanaraju*, (1934) 40 L.W. 536 and *Tallapargada Atchutharamayya* v. *Ayyagari Soorappayya*, (1938) 2 M.L.J. 894, overruled.

Case-law discussed.

Per *Krishnaswami Aiyangar, J.*—It is difficult to support a view of the law which attributes to the decision of a Survey authority, a higher efficacy than that which is annexed to the decision of a Civil Court of competent jurisdiction as per *Subbiah Pandaram* v. *Muhammad Mustapha Maracayar*, (1923) 45 M.L.J. 588: L.R. 50 I.A. 295: I.L.R. 46 Mad. 751 (P.C.). To have this consequence, language in the Act must be much more clear than that at present existing.

Appeal against the decree of the Court of the Subordinate Judge of Vizagapatam in A. S. No. 203 of 1934 preferred against the decree of the Court of the District Munsif of Vizagapatam in O. S. No. 174 of 1931.

B. V. Ramanarasu for Appellant.

Y. Suryanarayana for Respondents.

This second appeal coming on for hearing on 13th March, 1939, the Court (*Krishnaswami Aiyangar, J.*) made the following

ORDER.—The effect of the decision of a Survey Officer on the running of adverse possession is a matter on which judicial opinion

*S. A. No. 863 of 1935. 11th October, 1939 and 24th November, 1939.

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has not been uniform. I would rather that the second appeal is heard by a Bench of two Judges, after obtaining the orders of the Chief Justice.

This second appeal coming on for hearing on 2nd May, 1939, the Court (*Krishnaswami Aiyangar and Somayya, JJ.*) delivered the following judgment referring the case to a Full Bench;

The judgment of the Court was delivered by

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—The plaintiff is the appellant. The property in dispute is a house in Allipuram, a suburb of Vizagapatam. The original owner was one Sekharamantri Appalaswami, the father of the first defendant in the suit and the first respondent in the second appeal. Sekharamantri Appalaswami was indebted to the father of respondents 2 to 5, one Kanti Mahanti Appalanarasayya. For the recovery of the debt, K. Appalanarasayya instituted a suit against Appalaswami, and in execution of the decree obtained therein purchased the suit house on 7th January, 1916, and obtained a sale certificate on 2nd July, 1920. Though he thus obtained a perfect title to the house, he never reduced it to possession either by process in execution or otherwise. S. Appalaswami and after him his son the first respondent have continued in undisturbed possession of the house. By the date of the suit, they had been in possession for over fifteen years, a period sufficiently long to give them a prescriptive title under Art. 144 of the Indian Limitation Act against K. Appalanarasayya or any one claiming under him, or indeed against all the world. The plaintiff derives his title to the suit house from K. Appalanarasayya. He had advanced money on a mortgage of the house to the latter. On that mortgage the plaintiff instituted a suit and obtained a decree. In execution the plaintiff himself purchased the house on 6th September, 1929, and a sale certificate was issued to him on 10th October, 1929. Resisted in obtaining possession by the first defendant, he filed an application to remove the obstruction but the application was dismissed. Within one year of this adverse order, the plaintiff instituted the present suit to set aside the order, and to recover possession of the house. The claim is resisted by the first defendant, on the ground that the appellant's title assuming he had a good title has been lost by adverse possession. Seeing that on the findings of the Courts below the first respondent and his father have been in continuous and exclusive adverse possession of the property, the appellant would *prima facie* be barred. Acting on this view the Courts below have dismissed the suit, overruling a contention of the appellant advanced with the object of getting over the bar of limitation.

To appreciate that contention a few facts are necessary. In 1922, there was a Town Survey of Vizagapatam and its suburbs, in one of which namely Allipuram, we have said that the suit house is situate. The site of the house was demarcated as No. 967 belonging to K. Appalanarasayya, who as we have already mentioned, had

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purchased the property in Court auction in 1916, and had accordingly a perfectly good title at the time. This survey number as well as certain others formed the subject-matter of a survey dispute as shown by the order dated 29th November, 1922, of the appellate survey authority in land complaint Appeal No. 126 F.B. It may at this stage be mentioned that the survey was conducted under the provisions of the Survey and Boundaries Act (IV of 1897). It is found from the appellate order aforesaid that the appellant was one Mantri Lakshminarasimham. There were four respondents and two of them were K. Appalanarasayya and S. Appalaswami. It looks as if Survey No. 967 was claimed by the appellant as against K. Appalanarasayya and it does not appear that there was any dispute between K. Appalanarasayya and S. Appalaswami *inter se* as regards the suit house. The former produced his sale certificate of 1920, and on its strength he was recognised as the owner, and registered as such. The latter whose adverse possession was at the time only six years old could not with any chance of success object to the title of the former and for that reason apparently, acquiesced in the decision without raising any objection then or thereafter either within the time limited by S. 13 of the Act even afterwards. The survey order accordingly became final under S. 12 (3) and conclusive under S. 13.

It is contended for the appellant that the survey decision by reason of its statutory attributes has the effect of dissipating and putting an end to the prior title, if any, in the unsuccessful party, inclusive of such growing but immature right arising out of a possession for less than the statutory period. There can be no doubt, that such a possession is not to be treated as carrying no legal consequence, as the law invests the possessor with certain limited rights not only as against a stranger but even against the true owner. On the argument of the appellant the period of adverse possession prior to the order must be ignored altogether, and is not to be tacked on to the later period. The order of the survey authority, it is urged, has the effect in law of interrupting the continuity of the possession, and creating or recognising on its date a complete title, which can only be displaced by a fresh period of adverse possession for the statutory period to be counted from the date of the order. This is a question on which there has been a divergence of judicial opinion due to a decision of a Division Bench in *Azhagaperumal Pillai* v. *Rasa Pillai*[1], which strikes a note, it seems to us, different from that involved or expressed in the other cases of this Court including the Full Bench decision in *Muthirulandi*

1. (1931) 62 M.L J. 399.

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Poosari v. *Sethuram Aiyar*[1]. We shall revert to this question a little later.

It is to be observed that the finality attached by S. 12 (3) of the Act to a survey officer's decision, is a finality only for the purposes of the survey operations and the survey records compiled as a result of those operations. It has no further efficacy, and does not affect title, in particular: Vide *Chinna Venkatrayadu* v. *Ramamurthi*[2]. But the provisions of S. 13 have a more far reaching effect and it is settled that if a case fell within the section, and the suit contemplated by it is not instituted within the time limited, the survey order becomes decisive of even a question of title. But to have this consequence it must be clearly shown that the conditions of the section have been fully satisfied. In the present case we are of opinion that they are satisfied.

S. 13 is as follows:—

"Any party to a boundary dispute before the Survey Officer, and any party to an appeal preferred under S. 12 or to whom notice of such appeal is given, and any person claiming under any such party, deeming himself aggrieved by the order of the Survey Officer, or by the decision of the appellate authority as the case may be, may, subject to the provisions of Parts II and III of the Indian Limitation Act, 1877, institute, within the period of one year from the date of such order or decision, a suit to establish the right which he claims in respect of the boundary of the property surveyed: provided that, subject to the result of such suit, if any, such order or decision shall be conclusive as between the parties to the dispute or to the appeal, including those to whom notice of such appeal has been given, and those claiming under such parties or any of them"

The section makes it obligatory on the following descriptions of persons who deem themselves aggrieved by the order, to institute a suit within the period of one year to establish their claim on pain of being for ever precluded from agitating it by suit or otherwise. They are:—

(*i*) A party to a boundary dispute,

(*ii*) A party to an appeal preferred under S. 12, and

(*iii*) A person though not impleaded as a party to the appeal has yet had notice of the appeal served on him.

The effect of the section is to treat class (*iii*) as on the same footing as class (*ii*), as service of the notice of appeal makes them in fact, though not in form, parties to the appeal. If we refer to S. 12, it is clear a right of appeal is conferred on a registered holder the boundaries of whose holding is affected by the order of the survey officer. If the boundary is disputed before the officer, the order settling the dispute is made conclusive as between the

1. (1918) 36 M.L.J 356: I.L R. 42 Mad. 425 (F.B.).
2. (1920) 40 M L.J. 149: I.L.R. 44 Mad. 340.

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disputants by force of S. 13 unless challenged by suit. Even where no dispute had been brought up before the officer and the officer had merely directed the boundary to be laid down as pointed out by the registered holder or his agent, a right of appeal is given to a neighbouring holder on the issue of the notification contemplated by S. 11 (4). In this case, notice is directed by S. 12 (1) (*c*) to issue "to all registered holders, the boundaries of whose holdings may be affected by the proceedings in appeal." Both classes of persons, namely those originally impleaded by the appellant, and those others to whom notice is issued by reason of the fact that the boundaries of their holdings may be affected by the result of the appeal, are bound by the order passed by the appellate authority. This is the language of S. 13.

In the present case, both K. Appalanarasayya and S. Appalaswami were made parties to the appeal at the outset and we must presume that notice went to the latter in the appeal, and he was aware of the proceedings when they went on, and of the result after they ended. It is clear that the interests of these two individuals conflicted, as Appalaswami was holding possession adversely to K. Appalanarasayya, though it is equally clear that no actual conflict or dispute between them was brought up for determination by the appellate authority. On the contrary it is the claim of the appellant alone who apparently set up a right as against K. Appalanarasayya or perhaps even against all the respondents as a body, that was determined by the order. If the rule of *res judicata* as between co-defendants, is to be applied, we should be inclined to hold that the order in question cannot be taken to have conclusively determined the question of title as between the two respondents namely K. Appalanarasayya and S. Appalaswami as the adjudication on the point was not necessary for giving relief to the appellant. None of the respondents had a case which can be said to have been common to him and the appellant, so that the decision could be said to have settled a dispute latent at least in character as between the respondents though it did not come up in a practical form before the survey authority. Even apart from this consideration it seems to us that we shall not be warranted in applying the rule of *res judicata* to the decision of a survey authority under the Act especially after the pronouncement on the point by the Privy Council in *Radhakrishna Aiyar* v. *Sundaraswamier*[1], where their Lordships cited with approval the following passage in the judgment of the High Court, namely:

" The answer is that the general doctrine of *res judicata* is not in ques-

1. (1922) 43 M.L.J. 323: I.L.R. 45 Mad. 475.

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tion, but the application of the special rule stated in S. 52 (3), Estates Land Act . . . . . . "

The language of the section has therefore to be construed without reference to the body of rules evolved in relation to the doctrine of *res judicata* as applied to the decision of a Civil Court. From this standpoint it is only necessary to enquire whether K. Appalanarasayya and S. Appalaswami were parties to the appeal within S. 13, and not whether there was any active contest between them. Once it is shown, as it has been shown in this case, that S. Appalaswami was a party, the order is conclusive against him even though he had not actively resisted K. Appalanarasayya's claim. There is no hardship or injustice involved in this view being accepted. For it is difficult to imagine that a person being a party to the appeal and not realizing the nature or the consequence of a decision, if it went against him. If in spite of this knowledge, he chooses to keep quiet without questioning it by suit, he must take the consequence for which he alone is responsible.

It therefore becomes necessary to decide for the disposal of this second appeal the question to which we have adverted above. It will be enough to refer to three decisions of this Court to indicate the reason which has prompted us to refer the consideration of the question to a Full Bench. We may at once say that our inclination is to interpret the Full Bench decision in *Muthirulandi Poosari* v. *Sethuram Aiyar*[1], in favour of the appellant, that is to say, in support of the view that the adverse possession of the unsuccessful claimant during the period anterior to the decision of the survey authority is to be ignored as of no legal consequence. In the case before the Full Bench, the plaintiffs whose title to the property in dispute had been established by a decree of the Civil Court in 1900 continued in undisturbed possession till 1913 when on account of the defendants attempting to interfere with their possession they instituted the suit for an injunction against them. It appeared that sometime between 1904 and 1906 in the course of a survey conducted under the Act, the survey officer had passed an order demarcating the land as belonging to the defendant's father in spite of the plaintiff's opposition. The possession of the property however continued with the plaintiffs undisturbed by the defendants notwithstanding the survey order. The District Judge reversed the judgment of the District Munsif who had decided in favour of the defendants and held, following *Krishnamma* v. *Achayya*[2], that the plaintiffs were entitled to succeed as the

1. (1918) 36 M.L.J. 356: I.L.R. 42 Mad. 425 (F.B.).
2. (1879) I.L.R. 2 Mad. 306.

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demarcation of boundaries by the survey officer did not interfere with plaintiffs' continued enjoyment from even before the date of the order. A second appeal was preferred and came before Phillips and Seshagiri Aiyar, JJ., who considered it necessary to refer the following question to the Full Bench namely:

"When a plaintiff's claim has been disallowed under the Surveys and Boundaries Act IV of 1897, but he has been in possession of the property, does the decision of the survey officer operate as *res judicata* in a subsequent suit for possession?".

This reference was rendered necessary as in the view of the referring Judges the decision in *Krishnamma* v. *Achayya*[1], was felt to be of doubtful authority. In his order of reference, Phillips, J., expressed his inability to accept the contention based on this decision, that the plaintiffs' title could be supported on the strength of their adverse possession. If their possession both prior and subsequent to the survey order were taken into account, it was for more than the required duration, and the argument would have prevailed. But the learned Judge was of opinion that such addition was not permissible, as the survey officer's order had the effect of interrupting the continuity of the possession which the plaintiffs had held. The other referring Judge, Seshagiri Aiyar, J., appears to have shared the same opinion as in any other view it is not possible to understand his observation that the defendants acquired a title to the property *on the date of the Survey officer's demarcation.* The italics are ours and the words italicized involve the proposition that the survey order had the effect of creating a new title requiring to be displaced by a sufficient period of adverse possession to commence after its date.

The question propounded for answer by the Full Bench did not in terms expressly refer to the point adverted to above. None the less it is clear that the prior possession of the unsuccessful party which had continued undisturbed even after the order was obviously the ground of the doubt which called for solution. The answer was given by Wallis, C.J., on behalf of the Full Bench in a somewhat terse statement that the order

"if not reviewed by the appellate authority or questioned by suit as provided in the section was conclusive as to the rights of the parties, and none the less so because the unsuccessful party who was in possession at the date of the order was not subsequently ousted from possession."

There is no specific mention here of the effect of the survey order on the running of adverse possession, but it is equally certain that there is nothing to suggest a dissent from the opinion of the referring Judges. The continuance of the possession in the unsuc-

1. (1879) I.L.R. 2 Mad. 306.

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cessful party was held not to affect the conclusiveness of the order against him. When the second appeal came again before the Division Bench after the return of the answer by the Full Bench, the Court reversed the judgment of the District Judge, and negatived the claim of the plaintiffs. This result could have been arrived at only on the footing that the Full Bench had sanctioned the view of the referring Judges, *viz.*, that the survey officer's order brought about a break in the continuity of the adverse possession which should therefore be dated as from the date of the order and not earlier. It was in this sense Devadoss, J. understood the principle underlying the section, as interpreted by the Full Bench, and we think there is a great deal of force in it as the opposite view would tend to detract from the conclusiveness of the order, enacted by the section. His judgment was, however, upset on appeal under the Letters Patent, by a Bench of two Judges, Reilly and Ananthakrishna Ayyar, JJ. who took a different view of the ruling, supporting themselves by a pronouncement of Ramesam, J. in *Kuppuswami* v. *Venkataswami*[1], and also by an unreported decision of Benson and Krishnaswami Ayyar, JJ. in S. A. No. 1102 of 1909. They observed:

"Neither the decision of the survey officer, nor the planting of stones in accordance with it in proceedings under the Act *ipso facto* dispossesses any party, nor could it make a legal break in existing possession so as to render ineffective for purposes of limitation any adverse possession running at its date."

To our mind it appears, if we may say so with respect, that this expression of opinion is contrary to the view of the Full Bench, whatever merit there may be in the reason adduced by the Court, namely, that it would be very extraordinary if the survey officer's decision could have an effect denied to the decision of a Civil Court as in *Subbayya Pandaram* v. *Mohammad Mustapha Maracayar*[2], and *Singaravelu Mudaliar* v. *Chokkalinga Mudaliar*[3].

In a later decision reported in *Ramamurthi* v. *Gajapati Raju*[4], the view which prevailed in *Azhagaperumal Pillai* v. *Rasa Pillai*[5], was not accepted. The matter first came before Spencer, J. sitting as a single Judge in Second Appeal, from whose decision a Letters Patent Appeal was preferred which came up before a Division Bench composed of Waller and Pandalai, JJ. who differed. The main question on which the difference of opinion arose was as to what should be considered as a boundary dispute within the

1. (1922) 16 L.W. 99.
2. (1923) 45 M.L.J. 588: L.R. 50 I.A. 295: I.L.R. 46 Mad. 751 (P.C.).
3. (1922) 43 M.L.J. 737: I.L.R. 46 Mad. 525.
4. (1932) 64 M.L.J. 361: I.L.R. 56 Mad. 366.
5. (1931) 62 M.L.J. 399.

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meaning of the Act. With reference to the point now under consideration after referring to the Full Bench decision, Waller, J. expressed himself emphatically as follows:—

"The referring Judges in that case were definitely of opinion that the decision of the survey officer made a break in the adverse possession and that the period before the decision could not be tacked on to the period after it, so as to make the adverse possession continuous. And the Full Bench did not dissent from their opinion."

Pandalai, J. favoured the other view, accepted in *Azhagaperumal Pillai* v. *Rasa Pillai*[1], holding that a survey officer's decision as to boundary does not have the legal effect of terminating the possession of the man who was in possession or of breaking the running of his possession for purposes of limitation. On a reference to a third Judge, Wallace, J. endorsed the opinion of Waller, J. in preference to that of Pandalai, J. and animadverted on the contrary decision of the Division Bench, as not in accordance with the effect of the Full Bench ruling which according to him,

"held that the decision of a survey officer is a decision that the successful party is in possession even though the unsuccessful party was really in possession, and that the decision estops the unsuccessful party from urging later on that he was in possession."

An attempt at reconciliation of the conflicting views has been made by Wadsworth, J. in *Achutharamayya* v. *Soorappayya*[2] in which he has also endeavoured to support the decision in *Azhagaperumal Pillai* v. *Rasa Pillai*[1], by suggesting that the survey officer in that case had not determined any question of possession. According to the learned Judge, the survey officer's decision can be regarded as final only to the extent to which it purports to decide the rights of the parties, the governing factor being the actual decision. On this view it will be necessary in every case to enquire whether the decision of the survey officer was based on possession or on title. If it is based on an adverse finding against the title of the unsuccessful party on a mere consideration of the documentary evidence of ownership, that finding should not according to the learned Judge, stand in the way of his adding up his possession anterior as well as posterior, so as to make up the period required by the Limitation Act for a prescriptive title. With very great respect, we feel that the survey officer is not called upon to give an express decision on either title or possession. The Court is merely called upon to interpret the conclusiveness attributed to a demarcation of boundary by an officer charged with the duty of deciding a question of boundary only. An analysis of the basis of his decision, leading to a difference in the effect of the decision on the rights of the parties does not appear to be warranted by anything

1. (1931) 62 M.L.J. 399.

2. (1938) 2 M.L.J. 894.

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in the language of the section. We regret to say that we are not convinced of the correctness of the reasoning either on which the learned Judge has supported the decision in *Azhagaperumal Pillai* v. *Rasa Pillai*[1], as not being really inconsistent with the Full Bench ruling. However that may be, we think that the time has arrived for the conflict of opinion noticed above being resolved by a reference to the Full Bench of the following question:

> "Whether the order of a survey officer under S. 11, or of the appellate authority under S. 12 of the Madras Act IV of 1897 has the effect of causing a break as on the date of the order, in the continuity of the adverse possession held by the unsuccessful party, so as to preclude his making use of the period of his prior possession to make up the period of twelve years required by the Limitation Act to perfect a title by adverse possession?"

(This second appeal came on again for hearing, before the Full Bench, as constituted above.)

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—A person named Kantimahanti Appalanarasayya obtained a decree against one Sekharamantri Appalaswami and in execution of that decree attached immoveable property belonging to the latter in Allipuram, a suburb of Vizagapatam. The property was sold at a Court auction on the 7th January, 1916, and the decree-holder became the purchaser, the sale certificate being issued to him on the 2nd July, 1920. Appalanarasayya took no steps to gain possession of the property which remained with the judgment-debtor. In the year 1922, a resurvey of all the properties lying within the boundaries of Vizagapatam took place. The property which was the subject of the Court auction was registered as Survey No. 967. Notwithstanding that Appalanarasayya had made no attempt to obtain possession of this property he claimed it as his, and although the survey officer's order has not been produced it would appear that he was registered as the owner and that Appalaswami as the owner of an adjoining area marked as Survey No. 999. The Court has been given to understand that before the sale Appalaswami was the owner of both the areas. The Survey Officer's order was passed under the provisions of of S. 11 of the Madras Survey and Boundaries Act, 1897. An appeal from the order was preferred under the provisions of S. 12 of the Act and the appellate authority passed an order in

1. (1931) 62 M.L.J. 399.

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these terms:—

"The complaint in respect of S. Nos. 967 and 999 relate to wrong registration and as such does not fall within the scope of the Boundary Dispute Act, IV of 1897. The present registry in the names of Kantimahanti Appalanarasayya and Sekhara Mahanti Appalaswami, respectively is confirmed"

It is common ground that there was no dispute as to the boundaries of the respective properties. The only dispute was whether Appalanarasayya or Appalaswami's name should be registered as the owner of Survey No. 967.

In 1926, Appalanarasayya mortgaged Survey No. 967 to the appellant in the appeal out of which this reference arises. The appellant filed O. S. No. 299 of 1927 of the Court of the District Munsif of Vizagapatam to enforce his mortgage. He obtained a decree and the property was sold by the Court on the 6th July, 1929, the purchaser being the appellant to whom a sale certificate was granted on the 10th October, 1929. Appalaswami, who was in possession and had remained in possession throughout, refused to deliver the property to the appellant and Appalaswami's possession having been established, the appellant's application was dismissed. Within one year of the order of dismissal the appellant instituted the present suit in the Court of the District Munsif of Vizagapatam for a decree for possession. At the date of the suit, Appalaswami had been in adverse possession of the property continuously for fifteen years, unless the orders passed under the Madras Survey and Boundaries Act 1897 operated to create in law a break. The District Munsif dismissed the suit holding that the orders passed in the survey proceedings did not disturb the continuity of Appalaswami's possession. On appeal the Subordinate Judge concurred in this decision. A second appeal was then filed to this Court and came before Krishnaswami Aiyangar and Somayya, JJ. In view of the conflict which exists in the authorities the learned Judges have referred the following question to a Full Bench:—

"Whether the order of a survey officer under S. 11, or of the appellate authority under S. 12 of the Madras Act IV of 1897 has the effect of causing a break as on the date of the order, in the continuity of the adverse possession held by the unsuccessful party, so as to preclude his making use of the period of his prior possession to make up the period of twelve years required by the Limitation Act to perfect a title by adverse possession?"

This Bench has been constituted to answer the question.

Before turning to the authorities it is necessary to examine in some detail the provisions of the Madras Survey and

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Boundaries Act, 1897. That Act has been replaced by the Madras Survey and Boundaries Act, 1923, but as the survey proceedings took place under the old Act regard can only be had to the provisions of the former Act. I may in passing mention that so far as this case is concerned there is no material difference between the two Acts. The Act of 1897 was an Act relating to survey of lands and settlement of boundary disputes and its provisions can only have application to such matters. S. 11 (1) provided that if, at the time of survey, a boundary was undisputed the survey officer might order that the boundary should be laid down as pointed out by the registered holder or his agent. Sub-S. (2) said that if the the registered holder was not present, or if the boundary was disputed, the survey officer should order it to be laid down, as nearly as might be, in accordance with the village records, or as ascertained from the village officers and from such other evidence as the survey officer might be able to procure. Sub-S. (3) said that the order passed by the survey officer in the case of any dispute under sub-S. (2) should be recorded in writing and the purport thereof communicated forthwith to the parties to the dispute a copy of the order being furnished to them on their application and at their cost. Sub-S. (4) said that when the survey of a village or other defined local area forming part of the land under survey had been completed in accordance with the orders passed under sub-Ss. (1), (2) and (3) the survey officer should notify the fact as soon as practicable thereafter. S. 12 provided for appeals against orders under S. 11. Sub-S. (3) of that section said that the order of the survey officer, or, in the event of an appeal being filed, the decision of the appellate authority should be final, and there should be no further appeal from such decision. But S. 13 allowed the matter to be carried further by a suit. It said that any party to a boundary dispute before the survey officer, and any party to an appeal preferred under S. 12 or to whom notice of such appeal was given, and any person claiming under any such party, who deemed himself aggrieved by the order of the survey officer or by the decision of the appellate authority, as the case might be, might subject to the provisions of the Indian Limitation Act, institute within a period of one year from the date of such order or decision, a suit to establish the right which he claimed "in respect of the boundary of the pro-

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perty surveyed," provided that, subject to the result of the suit, if any, the order or decision should be conclusive. To this section was added an explanation in these words:

> "Where parties litigate *bona fide* in respect of boundaries of property claimed in common for themselves and others, all persons interested in such boundary dispute shall, for the purpose of this section, be deemed to claim under the parties so litigating."

There was no provision in the Act for the decision of any question of title unless it was in respect of land involved in a boundary dispute. If there was a boundary dispute the Act provided the machinery for its settlement and the survey officer's order demarcating the boundaries was final subject to an appeal under S. 12 or to the decision in a suit under S. 13. When it was a matter of a boundary dispute the survey officer had to decide where the boundary should lie and if he decided that the piece of land in dispute fell within the boundary of one of the opposing parties his order did affect the title to that particular piece of land. Where there was no boundary dispute, but in making the survey the survey officer found that two persons were claiming title to the same holding, he would for the purposes of the register have to decide whose name should be inserted therein as the owner, but this in itself did not mean that the Act empowered the survey officer, or the appellate authority to decide who was in law entitled to the property under survey. I can find no provision in the Act which can be read as operating in such circumstances to prevent *A*, when *B* had been registered as the owner of a holding, from instituting a suit in a Court of competent jurisdiction to establish his title as the true owner.

In *Kuppuswami* v. *Venkataswami*[1], Coutts Trotter and Ramesam, JJ. held that where the survey officer had found that the plaintiffs were in possession and no suit had been filed under S. 13 of the Act of 1897, the plaintiffs were entitled to a decree for possession, even though the defendants had as a matter of fact been in possession for over the statutory period of twelve years, part of which was before and the remainder was subsequent to the decision of the survey officer. Coutts Trotter, J. had no doubt that the survey officer's order was wrong, but he considered that the case was governed by the decision of the

1. (1922) 16 L.W. 99.

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Full Bench of this Court in *Muthammal* v. *The Secretary of State for India*[1]. I am unable to share the opinion that the Full Bench decision had application. In the Full Bench case Wallis, C.J. and Ayling and Seshagiri Ayyar, JJ. applied the doctrine of *res judicata* in these circumstances. A boundary settlement officer had decided under the Boundaries Act of 1860 that certain land did not fall within the boundaries of a mitta and had never formed part of the mitta. No suit was brought by the mittadar to contest this finding under S. 25 of the Act. The Full Bench considered that the ground of the decision as well as the actual decision was *res judicata* in a subsequent suit instituted by the mittadar to recover the lands as having formed part of the mitta or in the alternative for a deduction of the *peshkush* of the mitta. This dispute can only be regarded as a boundary dispute and the decision of the Full Bench is not in point in the present case, nor was it in point in *Kuppuswami* v. *Venkataswami*[2]. The Privy Council in *Radhakrishna Iyer* v. *Sundaraswamier*[3], held in a case arising out of the Madras Estates Land Act of 1908 that the doctrine of *res judicata* did not apply to a suit under that Act although the Board recognised that a statute might embody a special rule, which operated as a bar to the same question being reagitated in subsequent proceedings, and some day *Muthammal* v. *The Secretary of State for India*[1], may have to be reconsidered in the light of the ruling of the Privy Council in the case under the Madras Estates Land Act, but it is not necessary to dwell on the question here. Before leaving *Kuppuswami* v. *Venkataswami*[2], I may mention that in his judgment in that case Ramesam, J., indicated that in his opinion the decision in *Muthirulandi Poosari* v. *Sethuram Aiyar*[4] to which I shall next refer did not prevent a plea of adverse possession being raised subsequent to the decision of the survey officer.

In *Muthirulandi Poosari* v. *Sethuram Aiyar*[4], Wallis, C. J. and Ayling and Kumaraswami Sastri, JJ., held that an order passed by a survey officer under S. 11 of the Act of 1897 on a dispute arising between two parties with regard to the boundary

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1. (1914) 27 M.L.J. 529: I.L.R. 39 Mad. 1202.
2. (1922) 16 L.W. 99.
3. (1922) 43 M.L.J. 323: I.L.R. 45 Mad. 475 (P.C.).
4. (1918) 36 M.L.J. 356: I.L.R. 42 Mad. 425 (F. B.).

of a certain property was conclusive as to the rights of the parties if not set aside either on appeal or by a suit brought within one year, and it was none the less so, because the unsuccessful party who was in possession on the date of the order was not subsequently ousted from possession. The dispute merely related to the boundary of the two holdings and therefore fell within the four corners of the Act. The statement that the decision was none the less conclusive as to the rights of the parties, because the unsuccessful party who was in possession at the date of the order was not subsequently ousted from possession carried the decision no further. The Court was not considering whether one of the parties had obtained a title to an area by adverse possession.

In my opinion the correct view of the scope of the Act was taken by Reilly and Ananthakrishna Aiyar, JJ., in *Azhagaperumal Pillai* v. *Rasa Pillai*[1]. There it was said that the decision of a survey officer for the planting of stones for the demarcation of the boundary does not *ipso facto* dispossess any party, nor make any legal break in existing possession so as to render ineffective for purposes of limitation any adverse possession running at the date of the decision. In that case it was argued that the judgment in *Muthirulandi Poosari* v. *Sethuram Aiyar*[2] ran contrary, but this argument was rejected by the learned judges and the opinion of Ramesam, J., in *Kuppuswami* v. *Venkataswami*[3] was accepted as supporting their decision.

There are two cases which conflict with the decision in *Azhagaperumal Pillai* v. *Rasa Pillai*[1]. The first is *Ramamurti* v. *Gajapatiraju*[4] and the second is *Seetharamaraju* v. *Narayanaraju*[5]. In the first case in the course of a survey, a dispute arose whether a certain field lying wholly within the boundaries of a zamindari should be demarcated as an inam or as part of the ryoti land of the zamindari. The zamindar claimed the land as ryoti land and the inamdar as mirasi inam. The survey officer demarcated the land as his mirasi inam, and his decision was upheld on appeal. The zamindar did not file a suit under S. 13 of the Act but in a suit brought

1. (1931) 62 M.L.J. 399.
2. (1918) 36 M.L.J. 356: I.L.R. 42 Mad. 425.
3. (1922) 16 L.W. 99.
4. (1932) 64 M.L.J. 361: I.L.R. 56 Mad. 366.
5. (1934) 40 L.W. 536.

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subsequently by the inamdar against the zamindar the question of title was raised. The appeal was heard by Waller and Krishnan Pandalai, JJ. Waller, J. was of the opinion that the dispute was a boundary dispute within the meaning of the Act, that the survey officer had jurisdiction to decide the dispute and that as the zamindar did not file a suit within a year under S. 13 to get the decision set aside, it had conclusively decided that the land was government service inam and not part of the zamindari. Pandalai, J. held that the Act did not preclude the institution of the suit. He observed:

"In my opinion when two people dispute title to an ascertained and definite piece of land or to subordinate interests therein, the dispute cannot in any proper sense be described as a boundary dispute though, as a result of the disputed title being settled, the boundaries of the property of one or other of the disputants may be accordingly shifted. If there was a real boundary dispute, I can understand that a question of title depending solely on the boundary may become concluded as a necessary logical consequence but not by virtue of the Act. But if there was no such dispute, it cannot be inferentially introduced into a dispute about title and then held to be inferentially decided under the Act so that the question of title becomes concluded by a further inference. There was, in my opinion, no boundary dispute in the proper sense before the Assistant Superintendent of Survey, and his order, Exs. G and XXIII, being one on a matter beyond his jurisdiction could not become conclusive under the Madras Survey and Boundaries Act."

As the result of the disagreement the appeal was referred to a third Judge, Wallace J. who agreed with Waller J. Wallace, J. refused to accept the argument that there could not be a boundary dispute unless there was a dispute between two estates or between Government and an estate regarding the physical boundary of some piece of land contiguous to both, that is, a dispute as to "when, where and how" the boundary between both should run, but that if the dispute involved on one side or the other the whole of the contestant's property there could not be any boundary dispute, because the boundary of the disputed portion was not itself in dispute. The learned Judge said that he could see no principle in such a contention. I cannot agree. In my opinion the judgments of Wallace and Waller, JJ. are contrary to the scheme and the provisions of the Act. The Act was never intended to vest in the survey officer or in the appellate authority power to decide a pure question of title when the boundaries were accepted by both sides, which was the case in *Ramamurthi* v. *Gajapatiraju*[1].

1. (1932) 64 M.L.J. 361: I.L.R. 56 Mad. 366.

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The decision in *Seetharamaraju* v. *Narayanaraju*[1], was given by Butler, J. who followed *Ramamurthi* v. *Gajapatiraju*[2]. These two cases, therefore, stand or fall together.

The only other case which calls for mention is *Achutharamayya* v. *Soorappayya*[3]. There, Wadsworth J. endeavoured to reconcile the two conflicting views but I consider that they are too divergent for reconciliation. The learned Judge read the judgment of the Full Bench in *Muthirulandi Poosari* v. *Sethuram Aiyar*[4], as laying down the rule that the survey officer's decision under S. 11 of the Act of 1897 is conclusive as to the rights of the parties, but he said that it was apparent that the survey officer's decision could only be final to the extent to which it purported to decide those rights. If the survey officer decided that the unsuccessful claimant was not in possession, the learned Judge considered that it would not be open to the unsuccessful claimant to contend that he had acquired a title by adverse possession. On the other hand if the survey officer merely on a consideration of the documentary evidence of ownership gave an adverse finding regarding title, Wadsworth, J. saw no reason why that finding should bar the unsuccessful claimant from contending in subsequent proceedings that at the time of the survey officer's order he had trespassed successfully on the land in question and that his unlawful possession continued and was openly hostile to the real owner, taking into consideration possession before and after the survey officer's order. The governing factor was what the survey officer actually decided; the unsuccessful claimant could not go behind that. I have already indicated what my reading of the Act is and I cannot regard these statements of Wadsworth, J. as embodying a correct interpretation of the law.

The answer which I give to the reference is that an order of the survey officer under S. 11, or of the appellate authority under S. 12 of the Act, in itself had not the effect of causing a break in the continuity of the adverse possession held by the unsuccessful party so as to preclude his making use of the period of his prior possession to make up the period of twelve years required by the Limitation Act to complete his title. If the unsuccessful party remained in adverse possession of the

1. (1934) 40 L.W. 536
2. (1932) 64 M L J. 361: I L.R 56 Mad. 366.
3. (1938) 2 M L.J. 894.
4. (1918) 36 M.L.J. 356: I L.R. 42 Mad. 425 (F.B.).

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disputed area for over twelve years his title was good irrespective of any order passed under the Act. As my learned brothers are in agreement with me the majority decision in *Ramamurthi* v. *Gajapatiraju*[1], and the decision of Butler, J. in *Seetharamaraju* v. *Narayanaraju*[2], must be overruled. It follows that the observations of Wadsworth, J. in *Achutharamayya* v. *Soorappayya*[3], which are in conflict with the answer given to the reference should also be disregarded.

The costs of the reference will be made costs in the appeal.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.:—After the fuller and more elaborate discussion of the question before the Bench as now constituted, I feel that the opinion expressed by my Lord is the better and sounder one. In the order of reference I had expressed an inclination in favour of the other view which on further consideration, I agree is not maintainable on general principles no less than on the language of the statute. It is difficult to support a view of the law which attributes to the decision of a survey authority, a higher efficacy than that which is annexed to the decision of a Civil Court of competent jurisdiction as per *Subbayya Pandaram* v. *Mahammad Mustapha Maracayar*[4]. To have this consequence, language must be much more clear than what we have. I may add that my former inclination towards the opposite construction was in a large measure the outcome of the limitation imposed on me as a member of a Division Bench, bound by the opinions expressed by other benches and the legal consequences which might be regarded as flowing out of them. I now feel no doubt that the correct decision is the one, now given expression to by my Lord, and I have no hesitation in preferring it to the other.

Patanjali Sastri, J.

Patanjali Sastri, J.:—I agree with the judgment of my Lord and have nothing material to add.

(This Second Appeal coming for final hearing, after the expression of the above opinion of the Full Bench, the Court delivered the following judgment):—

The judgment of the Court was delivered by

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.:—In view of the answer given by the Full Bench, this Second Appeal is dismissed with costs of the first respondent. *Reference answered.*

K. C. ——— *Appeal dismissed.*

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1. (1932) 64 M.L.J. 361: I.L.R. 56 Mad. 366.
2. (1934) 40 L.W. 536.
3. (1938) 2 M.L.J. 894.
4. (1923) 45 M.L.J. 588: L.R. 50 I.A. 295: I.L.R. 46 Mad. 751 (P.C.).

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD THANKERTON, LORD ROMER AND SIR GEORGE RANKIN.

Jadunath Roy and others .. *Appellants**

v.

Parameswar Mullick and others .. *Respondents.*

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Mortgage—Mortgage of undivided share of immovable property by a Hindu under Dayabhaga—Mortgagor dying intestate—Equity of redemption vesting in mortgagor's son subject to charge for maintenance of mortgagor's widow and unmarried daughter—Partition suit after final decree on mortgage—Purchase by mortgagees in execution of mortgage decree—Mortgagees if successors in title to mortgagor's heir—Partition decree charging mortgaged properties for maintenance—Effect on mortgagee purchasers' rights—Mortgagee—How far necessary party to partition suit.

A Hindu governed by the Dayabhaga mortgaged his undivided share of certain immovable property and died intestate leaving a widow, a daughter, and a son, *B*, the latter being liable to maintain the two former out of any properties devolving on him as the mortgagor's heir. The mortgagees having obtained a final decree of sale, themselves purchased the property at a time when, in a partition suit in respect of the estate of which the mortgaged properties were part, a decree had been passed allotting his share to *B* in severalty subject to his mother's and sister's maintenance charge. An application made on 12th April, 1930, by the mortgagees, after the sale, to be made parties to the partition suit was dismissed by the Subordinate Judge, on the ground that such a step was then unnecessary but on 14th July, 1930, the Division Bench on appeal ordered that the mortgagees should be added as parties "as from 12th April, 1930, the proceedings taken before the said 12th April, 1930, being binding upon them just as much as they would be binding upon their predecessor in interest". The Commissioners of partition having in 1934 allotted certain of the properties forming part of *B's* 1/8 share to the mortgagees, but subject to a charge for the maintenance of the mortgagor's widow and daughter, the mortgagees successfully objected to the charge before the Subordinate Judge, but the High Court on appeal ordered the properties in question to be so charged, and settled the final partition decree accordingly, the Court acting on the strength of the order of the Division Bench of 14th July, 1930.

Held, (*a*) that the mortgagees, having purchased the 1/8 share free from encumbrances, acquired both the title of a mortgagee and the equity of redemption, with the result that they were not mere successors of *B* as seller of the equity of redemption, for they had an interest as complete owners which he had never possessed, that it was accordingly at no time correct or sufficient to regard *B* as the mortgagees' "predecessor in title", and that therefore no decision charging *B's* interest had any bearing on the mortgagees' rights either before or after the execution sale; (*b*) that the partition suit became defective as regarded the 1/8 share as a result of the execution sale, there being no longer before the Court any party with an interest in it;

* P. C. Appeal No. 79 of 1938. 30th October, 1939.
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(*c*) that the order of 14th July, 1930, accordingly need not be construed contrary to the rights of the parties, as holding that after the execution sale the widow and daughter had the same rights against the purchasing mortgagees as they had had against *B's* interest in the equity of redemption; and accordingly (*d*) that the mortgagees took the 1/8 share free from the maintenance charges in question.

How far mortgagees are necessary parties to partition suits discussed.

Appeal from a decree of the High Court, Fort William, Bengal, dated 8th January, 1937 (S. N. Guha and Bartley, JJ.) modifying the final decree passed in a partition suit by the second Court of the Subordinate Judge, 24 parganas, on 12th May, 1934.

The facts are fully set out in the judgment.

L. P. E. Pugh, K. C. and *W. Wallach* for Appellants.—It is submitted that there has been a fundamental misconception here in purporting to derive the appellants' rights in the property in question from Biswanath instead of from the mortgagor, Bhuban Mohan, who is the appellants' real and only predecessor in title. The mortgagors have acquired by purchase an indefeasible title in the properties now allotted to them, and it cannot be that those properties should be charged for a maintenance allowance which is the independent responsibility of Biswanath. The appellants have not come by an interest which was now chargeable with the maintenance of the widow and daughter. What they have succeeded to is the interest of Bhuban Mohan—an interest in connection with which there can never have been any talk of the maintenance charge in question. The interest which they acquired is accordingly free from the charge which it has been sought to put upon it.

There was no appearance by or on behalf of the respondents.

30th October, 1939. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—By three English mortgages executed in 1923 and 1924 one Bhuban Mohan Mullick (a Hindu governed by the Dayabhaga) mortgaged to appellant No. 1 and the father of the other four appellants his one-eighth share in certain immovable property. The capital sums secured amounted to Rs. 2,35,000. On 24th April, 1925, he died intestate, leaving him surviving a widow Sm. Annabati Dassi, a minor son Biswanath and an unmarried daughter Sm. Parbati Dassi (also a married daughter who need not here be further mentioned). By the decree under appeal, which is dated 28th January, 1937, it has been held by the High Court at Fort William in Bengal that the maintenance of the widow and unmarried daughter is a

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charge upon the interest of the mortgagees under the mortgages. This conclusion is *prima facie* opposed to the rights of the parties; indeed it does not in the end appear to have been doubted by the Courts in India that while the ladies would have a claim to a charge upon any property coming to Biswanath as heir to his father, the interest of the father's mortgagees was not such property and is not liable upon the death of the mortgagor to be burdened with the maintenance of his widow or daughter. In order to trace the steps by which a contrary result has been arrived at by the High Court it will clearly be important to bear in mind throughout that the appellant's mortgages were all taken from Bhuban Mohan in his lifetime and not from his son after his death.

The appellants brought a suit upon their mortgages in the High Court on 7th June, 1926, impleading Biswanath. They obtained a preliminary decree on 12th January, 1928, and a final decree for sale on 21st January, 1929. On 11th January, 1930, they purchased the mortgaged property at the execution sale and obtained a sale certificate on 19th February, 1930, in respect thereof.

On 30th August, 1929—some seven months after final decree and some five months before the execution sale—the partition suit, out of which the present appeal arises was brought in the Court of the Subordinate Judge, 24 Parganas. The one-eigth share which Bhuban Mohan had mortgaged was his share in certain properties which had belonged to his grandfather Kunja Bihari Mullick. Kunja had died in 1899 leaving a will whereby, after giving certain pecuniary legacies, he directed that the residue of his estate should go in equal shares to his three sons and a grandson by a deceased son. His fourth son was Pulin Behari, who died intestate on 28th December, 1919, leaving him surviving two sons, Bhuban Mohan and another. Hence Bhuban Mohan had a one-eighth share in a number of properties which had belonged to his grandfather and by the mortgages of 1923 and 1924 he had incumbered his share in some (not all) of these properties. The partition suit was brought by Murari Mohan, a son of Kunja's eldest son. Biswanath was impleaded as defendant No. 6, Annabati, his mother, and Parbati, his sister, were defendants 13 and 15 respectively. The appellants were not made parties to the suit. By a written statement filed on behalf of Biswanath, Parbati

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and the widow, it was submitted that Biswanath's one-eighth share should be allotted to him subject to the claim of his mother and sister for maintenance. On 1st October, 1929, a preliminary decree for partition was pronounced declaring the share of Biswanath to be "one-eighth subject to the charge for maintenance and other expenses of his mother, defendant No. 13 and marriage expenses and maintenance of his unmarried sister, defendant No. 15." Neither in the pleadings nor in the decree was any mention made of the mortgages to the appellants nor was any decision given with respect to the appellants' rights. The direction to the commissioners of partition was a general direction to make the valuation and allotments of the properties "according to the aforesaid shares," though in the case of some of the shares other than Biswanath's the decree provided for the maintenance of females being charged not on all the property allotted to each particular share but only on a sufficient part thereof.

On 12th December, 1929 (before the execution sale), and also on 14th January, 1930 (after the sale but before confirmation), the appellants applied to the Subordinate Judge that they might be made parties to the partition suit. By orders dated 29th January and 12th April, 1930, the Subordinate Judge refused their request on the ground that it was not necessary at that stage to make them parties; but he directed the commissioners of partition to hear the appellants' submissions. This order was challenged in the High Court and on 14th July, 1930, a Division Bench of the High Court set it aside directing that the present appellants should be added as parties to the suit "as from 12th April, 1930, on which date their application was rejected, the proceedings taken before the said 12th April, 1930, being binding upon them just as much as they would be binding upon their predecessor in interest." The Subordinate Judge having amended the plaint on 12th September, 1930, in accordance with this decision, the appellants (now defendants Nos. 17 to 21) on 17th September, applied to him to set aside or amend the preliminary decree in so far as it declared charges upon the share of Biswanath in favour of his mother and sister. This application was by order dated 23rd February, 1931, refused on the ground that by virtue of the High Court's decision "the decree that was passed on 1st October, 1929, is as binding upon them as upon their predecessor

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in interest and it is clearly not open to them to challenge anything that was done in relation to the proceedings in Court prior to the 12th April last." The argument of the appellants' pleader, "that it is not the defendant No. 6 who should really be treated as their predecessor in interest," was repelled on the ground that it was contrary to the language of the appellants' previous petitions, and the appellants were reproached for seeking to evade the express terms of the High Court's judgment. On 31st July, 1931, the appellants applied for separate allotment of their share to them and this was granted (21st November, 1931) without discussing the question of the charges in favour of Biswanath's mother and sister. The commissioners of partition on 17th January, 1934, made their final report allotting certain properties to the appellants but directing that these should remain charged as a security for the payment of the maintenance and other expenses of defendants 13 and 15. The appellants having objected to this direction, their objections were heard and were allowed by order dated 8th May, 1934. This order was not passed by the same learned Judge who had previously dealt with the case but by his successor (Babu Kali Prasanna Bagchi). After pointing out that the claim of the ladies to have priority over the appellants was untenable in law by reason that the mortgages had been granted by Bhuban Mohan in his lifetime and not by Biswanath after his father's death, the learned Subordinate Judge noticed that this question had not been argued or considered by the High Court, and concluded that no order had been passed in the matter. He did not think that the appellants were entitled to an order setting aside the preliminary decree and he regarded their previous application to that effect as ill-advised and rightly rejected. "But," he said, "a partition suit in which a preliminary decree has been passed is still a pending suit and the rights of the parties who are added after the preliminary decree have to be adjusted at the time of the final decree. The defendants Nos. 17 to 21 cannot ask for setting aside the preliminary decree but they can reasonably claim that at the time of the final decree they should get an allottment as purchasers and their rights should be adjusted." Accordingly he ordered that the properties allotted to Biswanath and those only should stand charged with the maintenance of his mother and sister, and not the properties allotted to the appellants. A final decree for partition was

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passed on the 12th May, 1934, in accordance with this direction. From this final decree, Biswanath, his mother and his sister on 28th June, 1935, appealed to the High Court, whose decree is dated 28th January, 1937. The view taken by the learned Judges was that "by virtue of the order of this Court passed on 14th July, 1930, the preliminary decree in the suit for partition passed on 1st October, 1929, would not be allowed to be altered or modified in any way in the present proceedings for partition." They agreed with the views expressed in the order dated 23rd February, 1921, by the learned Subordinate Judge (Babu D. L. Sen Gupta) who had dealt with the application of 17th September, 1930, to set aside or modify the preliminary decree, and considered that the appellants were seeking to nullify the effect of a decision *inter partes* by the High Court.

The final decree for partition as settled by the High Court is now before their Lordships on appeal but the appeal appears to turn solely on the High Court's order of 14th July, 1930—a reported decision (*Jadunath Roy* v. *Murari Mohan Mullick*[1]) which must necessarily have effect upon the procedure adopted in partition cases by the Courts of the province and elsewhere. It is unfortunate that no appearance has been made by the respondents and no argument heard on their behalf with reference to that decision, but their Lordships cannot omit to examine it.

A partition necessarily affects the interest of a mortgagee of an undivided share, since after the partition his security is upon the divided share or the separate allotment. For this reason some High Courts in India would appear to join such mortgagees as parties to the suit as a matter of course, and by some English authorities [*cf.* Daniels Chancery Practice (8th ed.) p. 198] the practice is considered to be that while a mortgagee upon the whole estate is not a necessary party a mortgagee of one of the undivided portions would be a necessary party [*cf. Swan* v. *Swan*[2] and *Sinclair* v. *James*[3]]. The practice in Bengal follows the lines laid down by Sir Arthur Wilson in 1880 in the case of *Mohindro Bhoosun* v. *Soshee Bhoosun*[4], where a person having a disputed claim to be a mortgagee from the plaintiff in a partition suit applied to be joined. In refusing

1. (1930) 35 C.W.N. 296.
2. (1819) 8 Price 518: 146 E.R. 1281.
3. (1894) L.R. 3 Ch. 554.
4. (1880) I.L.R. 5 Cal. 882.

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the application Sir Arthur Wilson said:—

"The question as between the plaintiff and the defendant is who is entitled to the property in dispute? To determine that question it is not necessary that the mortgagees should appear; they will not be bound by any finding come to in their absence. In case of a decree for partition being made the mortgagees should have leave to come in and attend the partition proceedings."

In 1894 Sale J. in *Khetterpal Sritiruino* v, *Khelal Kristo Bhuttacharjee*1, stated the practice succinctly: "A mortgagee is not a necessary party to a partition suit but he may and frequently does obtain leave to attend the proceedings as a quasi-party." The mortgagee of an undivided share might be prejudiced if that share did not receive a proper allotment in severalty, and it is for the benefit of all other persons interested in the joint property that such a mortgagee should be bound by the allotment. Hence it will in general meet the case if he is allowed to attend and be heard at that stage at which the making of a proper allotment is effected, just as in other types of case a person interested only in the result of a particular account may be allowed to attend at the taking of that account, especially if it be in the interests of others that he should not thereafter dispute the result. It is a fundamental condition of this practice in partition cases in Bengal that the extent of the share should not be in dispute; on that assumption an important advantage of the practice is that it lightens the partition suit by avoiding the necessity of deciding as to the existence and validity of the mortgages claimed over the undivided shares.

So far as regards the application made and decided in the present case before the execution sale had been confirmed, it is not necessary to examine or criticise the order of the learned Subordinate Judge. He may have been right in applying the ordinary practice and he had a discretion in the matter. But if he was right, he was right entirely because it was not necessary in order to safeguard the appellants' interests that they should be made parties, because without being parties to the suit they could be heard by the commissioners of partition on the question of the allotment proper to be made to answer the one-eighth share over which they claimed to have security, and because as

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(1894) I.L.R. 21 Cal. 904 at 909.

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to all else, in Sir Arthur Wilson's words, "they will not be bound by any finding come to in their absence."

The learned Subordinate Judge's order of 12th April, 1930, is however in a very different position. The effect of the sale under the mortgage decree was to divest Biswanath, his mother and his sister of all interest in the property comprised in the mortgages made by his father in 1923 and 1924. The ladies' interest was gone equally with his. Both his interest and theirs were derivative interests in the equity of redemption and arose to them only on the death of Bhuban Mohan in 1925. While the purchaser at an execution sale under a mere money decree gets no more than the right title and interest of the judgment-debtor at the date of the sale, the purchaser under a mortgage decree gets the right title and interest in the mortgaged subjects which the mortgagor had at the date of the mortgage and charged thereby. Buying the mortgaged property free from incumbrances he gets, as it is sometimes put, the title both of the mortgagee and of those interested in the equity of redemption. He is not a mere successor in interest of the owner of the equity of redemption at the date of the sale. The position of the partition suit so far as regards the property now in question was that as a result of the execution sale the suit had become defective: there was no longer any party before the Court who had any interest in this property. It was to the interest of all other parties that the suit should be properly constituted and it was not within a judicial discretion to insist that the suit should go on as regards this property behind the backs of the new owners. As Sale J. had said in the case already cited: "If the mortgagee had proceeded to a sale pending partition the purchaser would have become a necessary party to the partition suit." The learned Judges of the High Court were right therefore in directing that the appellants should be made parties. But the observation at the end of their judgment that "it goes without saying" that all proceedings taken before 10th April, 1930, would be binding upon the appellants just as much as they would be binding upon "their predecessor in interest" is not easy to interpret or accept. It may have been directed only to this—that there was no need to invalidate what had already been done in the suit merely because the appellants had not been parties at the time, that partition could proceed under the preliminary decree, the appellant's rights being adjusted thereunder. Sale, J.

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on a question of the costs of partition, had harmlessly referred (in the case already cited) to the original mortgagor as predecessor-in-title of a purchaser at a mortgage sale meaning no more than that he was the person who had previous to the sale represented the share in question before the Court. He had held that the purchaser could not take advantage of the partition and at the same time repudiate all liability for costs of partition incurred before his purchase. After referring to this passage in the judgment of Sale J., the learned Judges in the present case may have had similar matters in mind when they employed the same language, and the phrase "it goes without saying" suggests some such interpretation rather than a decision upon an important matter which had not been argued. But two Courts in India have interpreted the order made as a decision to the effect that because the preliminary decree of 1st October, 1929, rightly held the mother and sister of Biswanath to have a charge for maintenance upon what he inherited, the appellants—at one time mortgagees from his father and now purchasers of the whole original interest of his father—were liable to maintain his mother and sister out of the property and that partition should be made accordingly. This interpretation runs some risk of doing an injustice to the learned Judges, but if their Lordships may assume against the appellants that the order of the High Court involved an erroneous opinion to the effect that the preliminary decree of 1st October, 1929, bound the mortgagees, it still remains that the appellants had since the passing of that decree become purchasers of the whole interest in the share and that no decision as to their rights as purchasers had at any time been given in the suit. Their Lordships are not prepared to hold that the order of 14th July, 1930, must needs be construed, contrary to the rights of the parties, as holding that after the execution sale the ladies had the same rights against the purchasers as they had had against Biswanath's interest in the equity of redemption.

It is manifest that the ladies' interest in the equity of redemption equally with Biswanath's must be regarded as having passed to the appellants, if it is not regarded as having come to an end. At no time was it correct to treat the appellants as mere assignees of Biswanath's interest. Before the sale their interest was as mortgagees and was not represented in the suit. After the sale when they were made parties their

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interest as complete owners was before the Court—an interest which at no time had belonged to Biswanath. At no time was it correct or sufficient to regard Biswanath as "their predecessor in title"; upon any question as between Biswanath and other persons claiming to be interested in the equity of redemption a decision charging or limiting his interest had no bearing upon the rights of the appellants whether before the execution sale or afterwards.

Their Lordships fully agree with the observation made by the learned Subordinate Judge who passed the final decree in his order of 8th May, 1934, whereby he allowed the objections of the appellants to the commissioner's report on the ground that a partition suit in which a preliminary decree has been passed is still a pending suit and the rights of parties who are added after the preliminary decree have to be adjusted at the time of final decree.

In this view it becomes unnecessary to consider whether, if the High Court's order of 14th July, 1930, was binding upon the Division Bench who heard the appeal from the final decree, it necessarily follows that it could not be disturbed on appeal to His Majesty in Council.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the High Court dated 28th January, 1937, set aside, and the final decree of the learned Subordinate Judge restored. The respondents No. 9, 15 and 17 who appealed to the High Court must pay the costs of the present appellants incurred in the High Court and of this appeal.

Solicitors for Appellants: *Hy. S.L. Polak & Co.*

R. C. C.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Rowthmall Neopani through their representative Ladhuram Purohit .. *Appellant** *(2nd Respondent)*

v.

Nagarmall Madan Gopal represented by Prahalada Rai Kadia and others .. *Respondents (Petitioner and Respondents 1 and 3).*

Rowthmall Neopani *v.* Nagarmall Madan Gopal.

Companies—Liquidation—Court giving permission to liquidator to sell properties and sanctioning a contract of sale and compromise of two suits in another Court—If sanction can be revoked after the liquidator had acted upon it.

In liquidation proceedings the District Court gave the Official Liquidator a general permission to sell the properties (provided that a certain price was obtained) and also expressly sanctioned the contract of sale entered into by the Official Liquidator for a sum considerably in excess of the stipulated price. The Court further sanctioned the compromise of two suits in another Court between the purchaser and the company. The creditor on whose petition the winding up was ordered and another share holder applied for the revocation of these orders and the District Judge granted the application.

Held, once the official liquidator has acted upon it, the District Judge had no power to revoke the sanction he had given for the sale of the properties and compromise of the suits.

Chuni Lal Dakuwala v. *Kanthimathinatha Pillai*, (1920) 24 L. W. 35, distinguished and on the merits also held the sanction ought not to have been revoked.

Appeals against the orders of the District Court of Guntur dated 27th February, 1939, and made in I. A. Nos, 73 of 1939 District Court, Guntur and 85 of 1939 in O. P. No. 266 of 1936 (on the file of the High Court, Madras).

The Advocate-General (Sir A. Krishnaswami Aiyar) and *D. R. Krishna Rao* for the Appellant.

K. Rajah Aiyar and *K. Kameswara Rao* for the Respondents.

The Court delivered the following

JUDGMENT. *Burn, J.*—These are appeals preferred from the orders passed by the learned District Judge of Guntur on I. A. No. 73 and I. A. No. 85 of 1939 in O.P. No. 266 of 1936 on the file of the High Court, Madras. The original petition was for the winding up of the Guntur Cotton, Jute and Paper

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Mills Co., Ltd., and it was filed in the High Court on the 2nd October, 1936, and the winding up order was passed on the 17th December, 1936. The subsequent proceedings in liquidation were transferred to the District Court, Guntur.

It is not necessary, I think, to state again in detail all the facts which have been fully set forth in the order of the learned District Judge. Put quite briefly the position is as follows. On the 15th February, 1938, the District Judge gave permission to the Official Liquidator to sell the entire property belonging to the Guntur Cotton, Jute and Paper Mills Company Ltd. The permission was coupled with a condition that the sale should be for not less than Rs. 80,000. On the 19th January, 1939, the Official Liquidator entered into a contract of sale of the properties to one Rowthmall Neopani for Rs. 95,000 (Ex. IX). On the 23rd January, 1939, the District Judge approved of this contract of sale and permitted the Official Liquidator to compromise two suits (O. S. No. 15 of 1923 and O. S. No. 21 of 1924 on the file of the Sub-Court, Guntur) in which the company was concerned as plaintiff in the first and defendant in the second. In pursuance of the orders of the District Court, the Official Liquidator compromised both those suits and decrees were passed by the Subordinate Judge of Guntur in terms of the razinamas. On the 27th January, 1939, one N. Madan Gopal who had been one of the creditors on whose petition the winding up order was made, put in the application, I. A..No. 73 of 1939 in the District Court in which he prayed that the contract of sale said to have been entered into by the Official Liquidator with Rowthmal Neopani might be set aside, cancelling if necessary the order passed by the learned District Judge on the 23rd January. On the 31st January, 1939, Perripati Venkataratnam filed in the District Court I. A. No. 85 of 1939. He alleged that he was one of the shareholders in the Guntur Cotton, Jute and Paper Mills Company Ltd., and he prayed that the order passed by the learned District Judge on the 23rd January, 1939, which he described as an *ex parte* order, might be set aside and fresh orders passed. The learned District Judge disposed of both these applications together and passed identical orders in both. He decreed:

"That the permission granted by this Court on 23rd January, 1939, for the compromise of the suits O. S. Nos. 21 of 1924 and 15 of 1923, Sub-Court, Guntur, and for the sale of the mill properties be and hereby is revoked;

That the first respondent (that is the Official Liquidator) do hold a fresh sale of the properties by public auction as early as possible after due notice in the public press;

That if at the public auction to be held hereafter the property fetches only Rs. 95,000, the second respondent (Rowthmall Neopani) must be given preference over the other bidders and that if the property fetches more, it must be knocked down to the highest bidder; that the first respondent (the Official Liquidator) is hereby directed to obtain the sanction of the Sub-Court Guntur, for the sale of the property as he is also a Receiver appointed by that Court; and

That the respondents do pay the petitioner's costs."

Rowthmall Neopani has preferred both these appeals from the two orders of the Lower Court. The contentions of the learned Advocate-General for the appellant can be briefly stated as follows:—(1) the learned District Judge had no power to revoke the sanction which he had given on the 23rd January, 1939, for the sale of the properties, and for the compromise of the suits, and (2) that, even if the learned District Judge had power to revoke his own sanction, he ought not to have done it in the present case.

I am very clearly of opinion that the learned Advocate-General's contentions on both these points are well founded. It appears to me a very extraordinary suggestion that the District Court having given the Official Liquidator a general permission to sell the properties (provided that a certain price was obtained) and having expressly sanctioned the contract of sale entered into by the Official Liquidator for a sum considerably in excess of the stipulated price, and having sanctioned the compromise of two suits in another Court, should be able, by passing an order purporting to revoke its own sanction, to nullify the contract of sale and to render void the decrees passed by the Sub-Court in the two suits. Mr. Rajah Aiyar for the respondents has not been able to refer us to any section in the Companies Act which would authorise the District Court to pass such orders as those now under appeal. The application of N. Madan Gopal was filed under Ss. 179 and 183 (5) of the Companies Act. S. 179 describes the powers of the Official Liquidator which he can exercise with the sanction of the Court. S. 183 (5) provides that:

"If any person is aggrieved by any act or decision of the Official Liquidator, that person may apply to the Court and the Court may confirm, reverse or modify the act or decision complained of and make such orders as it thinks just in the circumstances."

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It is clear that S. 179 has no bearing upon this question, and S. 183 (5) clearly cannot apply to a case in which the act or decision of the Official Liquidator has been performed or made in pursuance of the Court's express sanction. Mr. Rajah Aiyar did not contend that S. 202 would have any application. He contended that the District Court had power to grant a review of its own previous orders either under the provisions of O. 47, Civil Procedure Code, or failing that he contended that that the District Court had inherent power to set aside its own orders in the interests of justice. Perripati Venkataratnam, the petitioner in I. A. No. 85 of 1939, based his petition on the same two sections and added also S. 153 of the Companies Act. Mr. Rajah Aiyar, did not suggest that S. 153 could have any application to this case. S. 153 gives power to compromise between a company and its creditors or any class of them or between the company and its members or any class of them. It provides that where any compromise or arrangement is proposed a meeting of the creditors or class of creditors or members of the company or class of members as the case may be must be called, held and conducted in such manner as the Court directs. The compromises in this case were between the company and one creditor who held a mortgage on the company's immovable properties. It was not a compromise between the company and a class of creditors and therefore the provisions with regard to the obligation to call a meeting are inapplicable.

There is, I think, no doubt that the Court in a proper case could grant a review under the provisions of O. 47, Civil Procedure Code but the applications in this case were not applications for review, and I do not see how they could be brought within the terms of O. 47. Mr. Rajah Aiyar was not able to show any authority for holding that in a case like this the District Court has inherent power to revoke its own sanction, after the sanction has been acted upon. He referred to the case of *Chuni Lal Dakuwala* v. *Kanthimathinatha Pillai*[1]. But that case was decided on a totally different point. Mr. Justice Krishnan expressed the view that in that case the Court had inherent powers to set aside its own previous order but he expressly stated that:

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1. (1920) 24 L.W. 35.

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"It was not material to decide in this case the somewhat difficult question whether the District Judge himself had jurisdiction to cancel his previous sanction."

The learned Judge's remarks on this point were therefore avowedly obiter. The learned Advocate-General lays stress very properly on the fact that, in pursuance of the permission granted by the District Judge to the Official Liquidator, the suits (O. S. Nos. 15 of 1923 and 21 of 1924) were compromised in the Sub-Court, Guntur, and he asks how those decrees of the Sub-Court can be rendered void by the order of the District Judge purporting to revoke the permission given by him on 23rd January? I am not aware of any answer to this question. The District Judge could of course have revoked his sanction if he had done so before the Official Liquidator had acted upon it, but if once the Official Liquidator has acted upon it, has compromised the suits and has obtained decrees in terms of the compromises, I am entirely unable to see how the District Judge can have power to revoke it.

Secondly it seems to me quite clear that the District Judge's order was wrong on its merits. He recognises that the compromises in the suits were beneficial to all parties and it would seem that he only revoked his sanction because he thought that it was technically bad for want of notice to "the persons interested." He states also that there was no prior sanction of the Sub-Court, Guntur, for the proposed sale and he says there was thirdly "the suppression of an important fact a knowledge of which would have prevented the giving of sanction." These matters can, I think, be very briefly dealt with. Mr. Rajah Ayyar has not been able to satisfy us that any notice to any body was necessary in this case. As I have already pointed out, the Official Liquidator had got from the District Court general authority on the 15th February, 1938, to sell the property either by public auction or by tender or by private sale, piecemeal or in one lot subject to the approval of the Court. All parties were well aware of this permission. N. Madan Gopal by his Vakil expressly stated on the 5th February, 1938, that he had no objection. The pleader for the mortgagee in O. S. No. 21 of 1924, also stated that he had no objection and the learned Judge in his order dated the 15th February, 1938 (Ex. IV (*c*)) has expressly said that "none appeared to oppose." Technically therefore it cannot be said that any notice to any-

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body was necessary after the Official Liquidator had entered into the contract of sale and before the District Court approved of it. The suggestion that the Sub-Court's sanction was necessary is apparently based upon the fact that Mr. Kota Venkateswaralu the Official Liquidator of the Company had also been appointed Receiver of the Mill's properties in O. S. No. 21 of 1924, the suit filed against the Company on a mortgage for Rs. 1,23,000 and odd. Mr. Rajah Ayyar has not attempted to support the order of the learned Judge on this gronnd. It is clear that when an Official Liquidator is appointed, he has power to dispose of the properties of the Company under S. 179 of the Companies Act and his power in this case was not limited by the fact that he had had no sanction in his capacity as Receiver in O. S. No. 21 of 1924. As for the suggestion that the learned Judge would have refused his sanction if he had known of an important fact which was suppressed, that is based upon the fact that N. Madan Gopal on the 20th January. 1939 made a written offer to the Official Liquidator of Rs. 96,000. The Official Liquidator refused to take any notice of this offer, because N. Madan Gopal made no deposit of earnest money and the Official Liquidator said that he did not believe it to be a *bona fide* offer. The Official Liquidator had good grounds for this view. N. Madan Gopal was well aware of the Official Liquidator's power to sell; he had been in negotiation with the Official Liquidator himself, he had on one occasion offered Rs. 81,001 on the 28th March, 1938, and even then he made no deposit of earnest money. His complaint that the transaction between the Official Liquidator and Rowthmall Neopani was conducted behind his back was groundless. Rowthmall's offer of Rs. 95,000 was made in November, 1938. The Vakil for the plaintiff in O. S. No. 21 of 1924 wrote to N. Madan Gopal on the 10th January, 1939 (Ex. VIII (*c*)) and in that letter he referred to the prospect of a compromise between the plaintiff in O. S. No. 21 of 1924 and the defendant company. N. Madan Gopal's reply to that on the 15th January, Ex. VIII (*d*) was that he was afraid to negotiate the purchase of the Jute Mill owing to long-standing disputes and he made no offer. On the 16th January, the same gentleman telephoned to N. Madan Gopal at Vizianagaram, and warned him that the offer of Rs. 95,000 made by Rowthmall Neopani was going to be accepted unless he made a higher

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offer. In these circumstances I think that the Official Liquidator was fully justified in paying no attention to the offer of Rs. 96,000 made on the 20th January, unaccompanied by any deposit and I do not think that the District Court would have been justified in refusing sanction to the Official Liquidator for the sale and the compromises even if the fact of that offer had been brought to the notice of the learned District Judge.

O. S. No. 21 of 1924 was a suit on a mortgage for Rs. 1,230,00, executed on the 2nd January, 1918, in favour of a member of the pydah family of Cocanada. By 1926 the claim under this mortgage had risen to somewhere between four and five lakhs. O. S. No. 15 of 1923, was a suit filed on behalf of the company to set aside the mortgage. The Official Liquidator was in great straits for money not only to conduct these suits but even to pay such small items as municipal tax on the buildings. None of the creditors would provide funds to prosecute O. S, No. 15 of 1923, or to defend O. S. No. 21 of 1924. In these circumstances the compromise by which the mortgagee received Rs. 70,000 in full satisfaction of his mortgage leaving Rs. 20,000 to satisfy the unsecured creditors to the extent of about Rs. 7,000 and odd was beneficial to all parties as the learned District Judge himself recognises. It is in my opinion extremely undesirable that by setting aside the sale these two suits should be reopened and the parties left to bear the risks of them. It is also to be observed that if all these matters are re-opened, there will be considerable delay in the disposal of still another suit O. S. No. 27 of 1934 on the file of the Sub-Court, Cocanada, which is a suit for the administration of the estate belonging to the Pyda family of Cocanada. I am therefore clearly of opinion that the learned Judge's orders were unjustified on the facts as well as being beyond his jurisdiction.

These appeals should therefore in my opinion be allowed and the applications I. A. No. 73 of 1939 and 85 of 1939 dismissed with costs. The appellant will recover his costs in Appeal No. 100 of 1939 from the first respondent N. Madan Gopal and in Appeal No. 101 of 1939 from the first respondent Perripati Venkataratnam.

Stodart, J.

Stodart, J.—I agree. One of the principal functions of the Liquidator is to discharge the debts of the company. For that purpose he may have to sell the company's property, and

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he can do this with the sanction of the Court. It follows in my opinion that any sales or contracts of sale effected by the Liquidator in pursuance of the Court's sanction previously obtained are not mere conditional agreements subject to subsequent confirmation by the Court. I say so for reasons which I think are obvious. If the Liquidator's proceedings are merely provisional and subject to the subsequent confirmation of the Court he will not be able to dispose of the property to the best advantage. Offers for the purchase of the property will be merely tentative. A prospective purchase will not disclose to the Liquidator the final figure to which he is prepared to go, if his offer is liable to be outbid by someone else when the sale comes up before the Court for approval. It appears to me therefore that, having sanctioned the sale of the company's property and having fixed a reserve price, the matter is closed so far as the Court is concerned and the Liquidator is free to dispose of the property provided he observes the conditions previously imposed by the Court. There must be some finality in the proceedings and if bids and offers made to the liquidator are to be subject to the subsequent approval of the Court, then the Liquidator will be a mere ministerial officer of the Court and the real sale will be effected by the Court itself. But that is not the meaning of the Act. S. 179 is:

"The Official Liquidator shall have power with the sanction of the Court to sell the property of the Company by public auction or private contract with power to transfer the whole thereof to any person ...... or to sell the same in parcels."

In my opinion this can only mean that the liquidator can finally dispose of the property once he has got the sanction of the Court. It does not mean that he has power merely to invite offers and to submit them to the Court for approval.

In the present case the offer of the respondent in A. A. O. No. 100 of 1939 whatever its *bona fides* was received after a contract of sale had been finally entered into with the appellant. That offer was too late. If the respondent was willing to go to Rs. 96,000 he would have done so months before. He put forward his offer only when he knew that the property was going to be sold to somebody else. He was not ready to pay cash down which was one of the conditions on which the Pydah mortgagees had consented to accept Rs. 70,000 in complete discharge of their mortgage.

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The order of the Court moreover which is now under appeal was not in the best interests of the company. Having set aside the contract of sale in favour of Rowthmall Neopani for Rs. 95,000 cash down entered into by the Liquidator because there was a subsequent offer of Rs. 96,000 by the respondent the Court directed that the property be sold by public auction, not be it noted starting with respondent's bid of Rs. 96,000 but presumably starting with the reserve fixed in February 1938. And the Court's direction that if the bid reaches Rs. 95,000 then Rowthmall Neopani must be given preference over the other bidders is something which I cannot understand. If Rowthmall was still anxious to purchase the property and if at the public auction he bid up to Rs. 95,000 and if there were no higher bids it follows that the property would be knocked down to him without any question arising of giving him preference over the other bidders.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

In the matter of the Indian Companies Act VII of 1913

and

In the matter of the Travancore National and Quilon Bank Ltd., (in Liquidation).

S. Barkat Ali and others .. *Petitioners**

A. S. S. R. St. Veerappa Chettiar .. *Applicant.*

J. V. Pirrie and another .. *Official Liquidators.*

In the matter of The Travancore National and Quilon Bank, Ltd. (in Liquidation); Veerappa Chettiar (Applicant).

Banker and customer—Liquidation of bank—Claim against customer on overdraft account—Amount due by bank on Fixed Deposit joint account nominally to overdraft creditor and another (either or survivor) but really solely due to overdraft creditor—Right to set off—Evidence as to sole right in joint account—If can be adduced.

In the liquidation proceedings of a bank the applicant claimed a set off of the amounts due and payable by the bank in respect of a Fixed Deposit in the accounts of its branch office in the name of himself and his mother payable to either or survivor, against the sum owing by him to the bank on an overdraft account. His case was that the sum covered by the Fixed Deposit receipt solely belonged to him and that his mother had no interest therein. The Official liquidators opposed the claim on the ground that the Fixed

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* Application No. 1552 of 1939 in O. P. No. 158 of 1938. 9th November, 1939.

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Deposit debt was a joint debt payable by the bank and as there was nothing to indicate that the mother was only a name-lender there could not be a set off. The liquidator relying on the observations of Brett, L.J., in 12 Ch. D. 491 at 500 (that set off could not be allowed unless a Court of Equity "without any terms or any further enquiry, would have obliged the sister to transfer the account into her brother's name alone") contended that the joint property must be found to belong to the applicant without any evidence.

Held: That "without any further enquiry" meant "without taking any account" and evidence as to sole right of customer in the joint account can be adduced.

Having found on the evidence that the Fixed Deposit amount was the sole property of the applicant *held* that the applicant will be entitled to a set off as claimed by him.

Ex parte *Morier* In re: *Willis, Percival & Co.* (1879) 12 Ch. D. 491 and *Hirschorn* v. *Evans*, (1938) 2 K.B. 801, relied on.

Judge's summons for directions to the Official Liquidators to allow the applicant to set off the amounts of the Fixed Deposit Receipt and cash certificates due to him from the Bank against the claim of the Bank from him on his overdraft account with the Bank.

B. Sitarama Rao (*The Government Pleader*) and *K. Chandrasekaran* for Applicant.

C. Krishnaswami Aiyar instructed by *Messrs. King* and *Partridge* for Official Liquidators.

The Court made the following

ORDER.—This is an application by one Veerappa Chettiar claiming a set off of the amounts due and payable by the Bank in respect of Fixed Deposit Receipt No. 64/38 dated 6th March, 1938, in the accounts of its branch office at Karaikudi for Rs. 7500 in the name of himself and his mother Visalakshi Achi payable to either or survivor and four cash certificates of the total value of Rs. 2071-8-0 against a sum of Rs. 10,087-15-9 owing by him to the Bank on overdraft account. Mr. Sitarama Rao, his learned counsel has not chosen to press his claim in regard to the cash certificates.

Therefore the only question that has to be considered is that relating to the amount covered by the Fixed Deposit receipt. It is the case of the applicant that the said sum solely belongs to him and his mother Visalakshi has no interest therein and that her name was included at the time of the original deposit in 1937 as the applicant was then in failing health. The Official Liquidators oppose the claim on the ground that from the terms of the Fixed Deposit Receipt it is a joint debt payable by the

In the matter of The Travancore National and Quilon Bank, Ltd. (in Liquidation); Veerappa Chettiar (Applicant).

Bank and there is nothing to indicate that Visalakshi was only a name-lender and therefore there could not be a set off of a joint debt against a separate debt. It is no doubt true that where there is an amount payable by *A* in his individual account and an amount payable to *A* and *B* in their joint account, the two accounts cannot be set off, but if it could be shown that, though the account is in the name of *A* and *B*, *A* is solely entitled to the amount, a set off has always been allowed. As Cotton, L. J., puts it in Ex parte *Morier*: In re *Willis, Percival & Co.*[1] the question is whether "it can be said that the money so absolutely belongs to that one of the two persons in whose joint names the account stands, who has another account of his own that we must treat it as his sole property, and require the balance to be struck between the two accounts". Whether the property belongs solely to *A*, can be found on evidence (Vide *Hirschorn* v. *Evans*[2] where a deposit receipt stood in the name of a husband and wife and the wife was examined to find out whether the money belonged solely to the husband or jointly to the husband and wife). Mr. Sitarama Rao has examined the applicant to prove that the money covered by the Fixed Deposit receipt solely belonged to him. It is clear from the evidence that he was carrying on business for some years before the deposit in the Bank, that the moneys from his business were from time to time invested in the Chartered Bank of India Ltd., that the account in the Chartered Bank stood solely in his name, that in March, 1937, there was a balance of nearly Rs. 9,000 in the Chartered Bank and he drew a cheque on the Chartered Bank for Rs. 8,670 in favour of the Travancore National and Quilon Bank Ltd. and that he directed the latter Bank to issue a Fixed Deposit receipt for Rs. 7,500 in the name of himself and his mother Visalakshi payable to either or survivor and utilise the balance in the purchase of some rubber shares. It is also clear from his deposition that Visalakshi was indebted to him in the sum of over Rs. 2,000 on the date of the said deposit and that the said deposit was renewed for another year on 6th March, 1938. I see no reason to disbelieve his evidence. It must therefore be found that the said sum of Rs. 7,500 is the sole property of the applicant. Once this conclusion is arrived at, the applicant will be entitled to a set off as claimed by him. The rule of law is absolutely clear and is thus stated in Hart's

1. (1879) 12 Ch. D. 491 at 502. 2. (1938) 2 K.B. 801.

In the matter of The Travancore National and Quilon Bank, Ltd. (In Liquidation); Veerappa Chettiar (Applicant).

Law of Banking, Vol. I at pages 309 and 310 thus:

"Where a person has an account in his own name and has another in the joint names of himself and a second person with the same banker, upon the bankruptcy of the latter the one account cannot be set off against the other, unless the person having the sole account is solely interested in the balance of the joint account, so that equity would have compelled the other person, without imposing any terms or directing any enquiry, to transfer the account into his name alone."

It is based on the case of Ex parte *Morier,* In re *Willis, Percival & Co.*[1] and the principle laid down in that case has always been accepted as good law. In that case two persons, a brother and sister were executors of an estate and they had a joint account in their joint names. The brother was also indebted to the Bank in a separate account. The question arose whether the amount in one account could be set off against the amount in the other. It was found in that case that it could not be ascertained that the brother was solely entitled to the amount because it depended upon the taking of an account and finding out whether the account would result in a balance in favour of the brother. The learned Judges took the view that the brother and the sister were in the position of joint creditors of the Bank having joint assets in the Bank and no set-off could be allowed. In the course of the judgment, James, L. J., remarked thus:—

"Unless it could be made out clearly that *A* and *B* were trustees of the fund for *A*, it seems to me there could not be an equitable set off, because the money is due *in autre droit* and where the money is due *in autre droit* the only exception which equity has introduced into the principle of a legal set off is when the money is really and truly the property of one man in the name of another, not when the result of taking the accounts would be to shew that the ultimate balance would be his property, but when it is nothing but what we used to call in the Privy Council a benami account, that is, an account put by one man into the name of another merely for his own convenience."

The learned Counsel for the Official Liquidators sought to rely on the following observations of Brett, L. J., namely that a set off could not be allowed unless a Court of Equity, "without any terms or any further enquiry, would have obliged the sister to transfer the account into her brother's name alone." His contention is that this language imports that without any evidence the property must be found to belong to the applicant and not as a result of any evidence being adduced. It seems to me that the contention is based on a misapprehension of the language

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1. (1879) 12 Ch. D. 491.

In the matter of The Travancore National and Quilon Bank, Ltd. (in Liquidation) Veerappa Chettiar (Applicant).

used by Brett, L.J. What Brett, L.J., really meant by the use of the expression 'without any further enquiry' was without taking any account. That this must be his meaning is clear from the observations of James, L.J., in the same case in the passage above cited and also at pages 499 and 500 as Brett, L. J., concurred in the judgment of James, L. J., for the reasons given by that learned Judge. (*Vide* page 500). It is in this sense that Brett, L. J., used the expression 'further inquiry' in his judgment. In view of my finding that the amount of Rs. 7,500 covered by the Fixed Deposit Receipt solely belongs to the applicant I direct a set off of the said sum against the money owing by the applicant to the Bank. The applicant will have the cost of the Judge's summons and Rs. 100 as and for his Counsel's fee. The Official Liquidators will have Rs. 100 for their costs, the costs to come out of the assets of the Bank.

K. S. *Application allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Pothukuchi Mahalakshmi .. *Appellant* (1st Plaintiff)*

v.

Modali Suryakanta Manikyamba and others .. *Respondents (2nd Plaintiff and Defendants 1 to 5, 7 to 12 and L. R. of 6th Defendant).*

Mahalakshmi *v.* Suryakanta Manikyamba.

Hindu Law — Stridhanam — Anwadheyaka — Succession — Widowed daughter and daughter's daughter—Preference—Difference between the Smriti Chandrika and Mitakshara—Preference.

The Mitakshara is the prevailing authority and in a competition between a widowed daughter and daughter's daughter to the succession to Anwadheyaka Stridhanam the daughter is preferred and the fact that she is a widow makes no difference.

Second Appeal against the decree of the Court of the Subordinate Judge of Ellore in A. S. No. 255 of 1935, preferred against the decree of the Court of the District Munsif of Tanuku in O.S. No. 432 of 1933 etc.

M. S. Ramachandra Rao for Appellant.

K. Kameswara Rao and *M. Appa Rao* for Respondents.

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* S. A. Nos. 705 and 751 of 1936 and A. A. O. No. 388 of 1936. 31st October, 1939.

Maha-lakshmi *v.* Suryakanta Manik-yamba.

The Court delivered the following

JUDGMENT.—The only question that arises in Second Appeal No. 705 of 1936 is whether a daughter's daughter is to be preferred to a widowed daughter in the matter of inheriting Anwadheyaka Stridhanam property. Both the lower Courts have held that the widowed daughter was to be preferred. One of the grand-daughters (the first plaintiff) has appealed.

The contest between the widowed daughter and the grand-daughter arises because of a difference of opinion with regard to this matter, in the Mitakshara and the Smritichandrika. The Smritichandrika says that Bhartridatta and Anwadheyaka stridhana pass to sons and daughters, all inheriting together in equal shares and that daughters include maiden daughters and married daughters whose husbands are alive, but not widowed daughters. The order of inheritance given by the Mitakshara with regard to the same class of property is (1) unmarried daughter; (2) married daughter who is unprovided for; (3) married daughter who is provided for; daughter's son, son, and others coming later. The question whether with regard to the inheritance of Stridhana property, the Mitakshara is to be preferred to the Smritichandrika was carefully considered by Muthuswami Ayyar, J., in *Simmani Ammal* v. *Muthammal*[1], and he has given cogent reasons for preferring the Mitakshara on this point. He says that all commentators other than the Smritichandrika have followed the Mitakshara and that the Smritichandrika stands alone in its interpretation, which Ghose in his Hindu Law says is due to a misapprehension of the text of Katyayana.

The precise problem presented in this appeal has not been decided; but the same texts have been considered not only in *Simmani Ammal* v. *Muthammal*[1], but in a number of other cases, including *Bhujanga Row* v. *Ramayamma*[2] and *Muthappudayan* v. *Ammani Ammal*[3]. Muthuswami Aiyar, J., was also a party to the decision in *Bhujanga Raw* v. *Ramayamma*[2], which naturally follows *Simmani Ammal* v. *Muthammal*[1]. Both in *Muthappudayan* v. *Ammani Ammal*[3] and in *Rajugramani* v. *Ammani Ammal*[4], it has been made clear that in the Presidency of Madras the Mitakshara is the paramount

1. (1880) I.L.R. 3 Mad. 265. 2. (1884) I.L.R. 7 Mad 387.
3. (1897) 8 M.L.J. 9: I.L.R. 21 Mad. 58.
4. (1906) I L.R. 29 Mad. 358.

Maha-lakshmi v. Suryakanta Manik-yamba.

authority. *Sengamalathammal* v. *Velaynda Mudali*[1], is the only case in which the Smritichandrika seems to have been preferred to the Mitakshara and that was because it was found that the particular text of the Mitakshara under consideration was based on a mistake and all the other authorities were unanimous in giving a different interpretation.

If the Mitakshara is the prevailing authority on the point raised in this appeal, there can be no doubt that the fact that the daughter is a widow makes no difference. All the text books agree that daughter in this text of the Mitakshara includes a widowed daughter and one of the reasons for this is that the order of preference among the daughters depends largely upon their indigence. Just as an unprovided married daughter is preferred to a married provided daughter, so a married daughter who had lost the support of her husband is preferred to a married daughter who has not. Second appeal No. 705 of 1936 therefore fails and is dismissed with costs. S.A. No. 751 of 1936, which raises *inter alia* the same point, is from the judgment of the Government Agent, East Godawari. As the appeals are from judgment of different Courts there should, I think, be separate costs, especially as there is another point in this appeal which would have had to be argued if the above point of law had been decided otherwise. S. A. No. 751 of 1936 is therefore dismissed with costs also.

C. M. A. No. 388 of 1936, for similar reasons, is dismissed but without costs.

(Leave refused).

Appeal and application dismissed.

K.S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Kasireddi Siddareddi (dead) and others .. *Appellants** (*Plaintiff and his L. Rs.*)

v.

Mandapalle Co-operative Society, by its President, Devarakonda Subbaramayya and another .. *Respondents* (*1st Defendant and Nil*).

Kasireddi Siddareddi v. Mandapalle Co-operative Society.

Madras Co-operative Societies Act (VI of 1932)—Award by Registrar on one loan—Sale in execution without mentioning another mortgage loan—Effect—If purchaser gets the property free of encumbrance.

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1. (1867) 3 M.H.C.R. 312.

* S. A. No. 611 of 1936. 31st October, 1939.

Kasireddi Siddareddi *v.* Mandapalle Co-operative Society.

A purchaser in sale in execution of an award under Madras Co-operative Societies Act filed a suit for declaration that the property purchased by him was free of encumbrances as there was no mention of encumbrances in the sale proclamation.

Held, there was no duty cast upon the Co-operative Society to reveal their mortgage and so there was no estoppel and the purchaser did not get the land free of encumbrances.

Govindarajulu Naidu v. *The Secretary of State for India*, (1933) 65 M.L.J. 317, referred to.

Second Appeal against the decree of the Court of the Subordinate Judge of Cuddapah in A. S. No. 50 of 1935 (A. S. No. 82 of 1934, District Court) preferred against the decree of the Court of the District Munsif of Nandalur in O. S. No. 53 of 1933.

Ch. Raghava Rao for Appellants.

A. Bhujanga Rao for Respondents.

The Court delivered the following

JUDGMENT.—The husband of the second defendant, Lakshmayya, owed two sums of money to the Mandapalle Co-operative Society. The first was secured and the second unsecured. The Registrar passed an award with regard to the first debt; and it was then sent to the revenue authorities for execution under rule 14 (5) of the Co-operative Societies Act and for recovery of the decree amount as if it were arrears of land revenue. Where land is sold for recovery of land revenue it is sold free of encumbrances; but it has been frequently held that where land is sold for the recovery of money due to Government or to public bodies under Special Acts, such as the Co-operative Societies Act and Abkari Act for example, the land is not actually sold free of encumbrances. Nevertheless, a precisely similar form of proclamation is generally used in the recovery of such money; and so there is no mention in the proclamation, as there would be in a proclamation in a sale held under the Civil Procedure Code, of any encumbrance. In the present case, although there were encumbrances, there was therefore no mention of them in the proclamation; and the appellant purchased the land believing, he says, that there were no encumbrances on it. He therefore brought the present suit for a declaration that this land belonged to him free of all encumbrances. The question that arose for consideration in the Courts below and also arises here is whether, in fact, the land may be deemed to belong to the appellant free from encumbrances or not. The lower

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appellate Court held that the land was not sold free of encumbrances and it therefore dismissed the suit.

The land can only be deemed to have been sold free from emcumbrances if there was a duty cast upon the Co-operative Society of informing intending purchasers that the land was being sold free from encumbrances. No satisfactory reason has been given to me why it should be assumed that such a duty lay upon the Co-operative Society. Ordinarily, the principle of *caveat emptor* applies and the mortgagee is under no obligation to reveal his mortgage. There was further no reason why the appellant should conclude, from the absence of any mention of any encumbrance in the proclamation, that there was no encumbrance. There were in fact three encumbrances, one of which was in favour of his own father and uncle. If there was no duty cast upon the Co-operative Society to reveal their mortgage, then there was no estoppel. The Co-operative Society did not do any act which led the appellant to believe that there was no encumbrance and to bid on that assumption.

The learned Advocate for the appellant has placed reliance on some observations in *Govindarajulu Naidu* v. *The Secretary of State for India*[1]. There, some property was sold for arrears of abkari revenue. The purchaser did not pay the money he bid and so the land was resold and the Government sought to recover from the first bidder the difference between the amount that he bid and the amount that was subsequently realised in the second sale. That difference was an enormous one; and the Court concluded on the facts that the difference was due to the fact that the property was first sold with a proclamation in the ordinary form, whereas in the second case it was sold with a proclamation which revealed an existing mortgage. In that decision, far from it being held that the proclamation was bound to reveal the mortgage, it was held that the Government were not legally bound to notify in the sale of immovable property for default under the Abkari Act that it is subject to encumbrances. The decision in that case turned on the finding that the same property was not sold on the two occasions. S. 36 (4) of the Revenue Recovery Act runs thus:—

"Where the purchaser may refuse or omit to deposit the said sum of money. . . . . . . the property shall be re-sold at the expense and hazard of such purchaser."

1. (1933) 65 M.L.J. 317.

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It was there held that the property that was sold in the first instance was property free of mortgage and the property sold in the second case was property subject to a mortgage, and that therefore S. 36 (4) did not apply, in that the same property was not re-sold.

The Co-operative Society was therefore under no legal obligation to notify that mortgage, although one would have expected them to do so. In fact, they seem to have done their best to notify bidders. D. W. 1, who was acting on behalf of the Co-operative Society, obtained an encumbrance certificate and sent it to the Tahsildar before the sale. He was surprised, he says, to learn that no mention was made of the encumbrance. The appellant could have ascertained the existence of the mortgage if he had so chosen; and as there was no mention of an encumbrance or the absence of one in the proclamation, one would have expected him to have ascertained before purchasing the property whether or not there was any encumbrance.

The appeal fails and is dismissed with costs.

(No leave).

K. S. —— *Appeal dismissed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Guruswami Tevar and others .. *Accused* (Prisoners) (Accused 1, 2 and 4 Appellants 1 to 5).*

F.B.

Guruswami Tevar, *In re.*

Evidence Act (I of 1872), S. 32—Dying declaration and statements by deceased uncorroborated by other evidence—Sufficiency to justify a conviction.

A statement made by a person who is dead as to the cause of his death is evidence notwithstanding that he was not under expectation of death when he made it. Such a statement does not necessarily require corroboration.

It is not possible to lay down any hard and fast rule as to when a dying declaration should be accepted, beyond saying that each case must be decided in the light of the other facts and surrounding circumstances, but if the Court after taking everything into consideration is convinced that the statement is true, it is its duty to convict, notwithstanding that there is no corroboration in the true sense.

* R. T. No. 119 of 1939 (Crl. Appeal No. 508 of 1939). 4th December, 1939.

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Gurnswami Tevar, *In re.*

Decisions of Beasley, C. J., and Gentle, J., in Crl. Apps. Nos. 653 of 1935 and 148 of 1936 (Unreported) and In re *Dabbukota* and six others. 2 Weir, 753, disapproved.

Decision in R. T. No. 112 of 1937 (unreported) approved.

Reference to Full Bench under R. 2 of the Appellate side rules by Burn and Mockett, JJ., in Trial referred by the Court of Session of the Tinnevelly Division for confirmation of the sentences of death passed upon the said prisoners in Case No. 60 of the Calendar for 1939 and appeal by the said prisoners.

E. R. Balakrishnan for the Accused.

The Public Prosecutor for the Crown.

The Court (Burn and Mockett, JJ.), made the following

ORDER.†—The appellants have been convicted of murder by the learned Sessions Judge of Tinnevelly and the first, second and fourth appellants have been sentenced to death. The third and fifth appellants have been sentenced to transportation for life.

The case is one of a simple nature but there is an important question of law involved. There is no doubt about the fact that, on the early morning of the 31st of March, 1939, Nammalwar Naicker, a resident of the village of Kalugachalapuram, was attacked while he was on his way to the village of Mannagopala-naickenpatti. He was stabbed in 38 places and he died soon after midnight. The Sub-Assistant Surgeon (P.W. 1) who was in charge of the hospital at Ettiyapuram saw him at 1 P.M. and found 32 injuries on him, of which seven were penetrating wounds into the abdomen and one was a penetrating wound in the chest. This Sub-Assistant Surgeon was not able to do anything for the man beyond rendering first aid and then he sent him on to the Head-quarters Hospital at Palamcottah. Another Sub-Assistant Surgeon (P.W. 2) made a postmortem examination on the 1st of April and then he found that there were in all 38 injuries. P.W. 1 expressed an opinion that the abdominal injuries inflicted upon Nammalwar Naicker would only prove fatal in the absence of medical or surgical treatment but that, if treated properly, there was "every chance" of the injured man escaping death. This is a very remarkable opinion and, in our opinion, it is worthless. The post-mortem certificate shows that two of the stabs not only penetrated the abdomen but punctured the intestines, so that fœces escaped into the peritoneal cavity. It is quite clear that Nammalwar Naicker was fatally wounded by persons who meant to kill him, and that he never had any chance of recovery.

† 21st November, 1939.

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There are no eye witnesses in the case, the assassins having been careful to choose a time when there was nobody in sight. The case against the appellants rests almost entirely on statements said to have been made by Nammalwar Naicker himself before he died. Three witnesses P.Ws. 6, 7 and 8 say that they were in the vicinity and that they were attracted to the spot by the cries of Nammalwar Naicker but they do not corroborate him any further than by saying that the number of persons whom they saw running away was five. As the learned Sessions Judge has said, there are four statements of Nammalwar Naicker to be considered. In the first place, P. Ws. 6, 7 and 8 say that as soon as they reached him he told them the names and fathers' names of the five persons who had attacked him. Those are the names of the present five accused persons. P.W. 6 ran to the village and informed P. W. 12 the brother-in-law of the deceased. P. Ws. 12, 13 and others went to the place where Nammalwar Naicker was lying stabbed. Nammalwar Naicker is said to have told those witnesses also the names and fathers' names of these five Appellants. P.W. 12 went and fetched the Village Munsif, P. W. 21. He reached the scene of the murder at about 8 O'clock in the morning and he took down a statement from Nammalwar Naicker which is Ex. K. In that also the names and the fathers' names of the five appellants are found. Finally at about 2-30 P.M. on the same day in the hospital at Ettiyapuram a dying declaration (Ex. A) was recorded by a Special Magistrate (P.W. 4). In that again the deceased has stated that these five persons attacked him and stabbed him.

Learned Counsel for the appellants has attempted to show that the statement (Ex. K.) recorded by the Village Munsif was a concoction but he has not adduced any convincing arguments in support of that proposition. It was proved that there was enmity between Nammalwar Naicker and the accused, but the accused were not the only members of the Marava caste with whom the deceased was at enmity. P. Ws. 6, 7, and 8 belong to a different village Mannagopalanaickenpatti, and no enmity whatever was even suggested between them and any of the accused. There is therefore no reason why these witnesses should say falsely that Nammalwar Naicker named these five persons as his assailants. We can see no reason to believe that Ex. K was concocted.

The next contention of learned Counsel for the appellants is that Ex. K and Ex. A are widely discrepant. This contention is based upon the fact that in Ex. K, Nammalwar Naicker is recorded as having said that, when the five appellants approached him, the first appellant came and gave him a stab with a *soori* (dagger) in the abdomen and afterwards the four persons joined together and

stabbed him in the body. In Ex. A, however, he has given a much more detailed account in which he says that Guruswami Tevar (the first accused) stabbed him not only in the abdomen but in several other places before any of the other accused stabbed him at all. He also says that the third and fifth accused held his legs while the other three accused 1, 2 and 4 were stabbing him. We are not able to see that there is any discrepancy in these statements. In Ex. K the wounded man has stated that all the five persons joined together and stabbed him. This cannot be said to be an inaccurate description of the occurrence. If five persons jointly attack a man and two of them hold him while the others stab him, he cannot be considered to be an untruthful person if he says that they all five stabbed him. The only real inconsistency that is apparent between Ex. K and Ex A, is with regard to a knife. In Ex. K, Nammalwar Naicker said, "When I warded off the soori which Kandiah Thevan had, it fell down." In Ex. A he said, "When they stabbed me, I wrested the soori from Krishna Thevan." Now, Krishna Thevan is the name of the second accused and Kandiah Thevan is the name of the fourth accused. In Ex. K, Nammalwar Naicker does not mention that he wrested a knife from the second accused and in Ex. A he does not mention that, while he was warding off a blow aimed at him by the fourth accused, the fourth accused's knife fell down. These however cannot be considered as contradictions. The learned Public Prosecutor points out that at the scene of offence two knives were actually found, one in a sheath and one bare. Apart from this, there is no discrepancy, and both these statements show that Nammalwar Naicker charged these five persons with the attack upon him. We cannot find also, as already stated, any reason to disbelieve P. Ws. 6, 7 and 8 and P. Ws. 12 and 13, and their evidence makes it clear that from the very beginning, within a few seconds after he was attacked, Nammalwar Naicker has been alleging that these five appellants are responsible for his death.

We agree with the learned Sessions Judge therefore that the statements of Nammalwar Naicker have been truthfully described by the witnesses and in the documents Exs. K and A. The next question, as the learned Sessions Judge has pointed out, is whether Nammalwar Naicker's statements are true. As to this, the plea of the accused was that the whole case was a concoction against them by P. W. 12 and the Village Munsif on account of the enmity due to faction between the Thevars (Maravars) and the Naickers. The third accused alleged that he had been sick for the last eight months and therefore confined to his house. He repeats the statement in his appeal petition from jail. None of the accused offered any explana-

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tion beyond this bare denial and allegation that the case was concocted on account of faction and none of them cited any witnesses. As already observed, there was enmity between the deceased and the Maravars of Kalugalaschalapuram but there was no special enmity between the deceased and these five appellants, and, as the learned Sessions Judge has observed, there was not the slightest reason shown why Nammalwar Naicker, within a few seconds of being stabbed, should have made up his mind to exculpate the persons who really attacked him, and to accuse falsely five persons who had nothing whatever to do with the matter. It was sunrise when this attack on Nammalwar Naicker took place. He was stabbed in 38 places, which must have taken some time, so that he had ample opportunity to see who were the persons who were stabbing him. We can find no reason for doubting the truth of the statements made by Nammalwar Naicker. If they are believed, the appellants are clearly guilty of his murder.

The point of law which arises is whether, on the statements of a deceased person such as these, uncorroborated, (except as to the number of the assailants), the appellants can be convicted of murder. The weight of authority appears to be in favour of the view that a conviction based wholly upon the statements of a deceased person is not illegal. This was assumed in the case of Sanjappa (R. T. No. 112 of 1937) in which the judgment was pronounced by one of us, but in that case the judgment in Crl. Apps. Nos. 653 of 1935 and 148 of 1936 was not brought to our notice. Those appeals were heard by Sir Owen Beasley, C. J., and Gentle, J., and the judgment contains passages indicating that a dying declaration uncorroborated by other evidence could not justify a conviction. The learned Judge says:

"Whilst the contents of a dying declaration can be relied upon as evidence for the prosecution, in the absence of any corroboration of its contents, it is clear from the authorities and the text books that it is dangerous, imprudent and opposed to practice to do so, even when no justifiable criticisms can be levelled against the declaration."

In the case in question the learned Judge showed that the dying declaration upon which the prosecution relied was unreliable; but the observations are of a general nature. And in another place the learned Judge has said:

"Apart from the dangerous practice of relying upon the uncorroborated contents of a dying declaration alone .. .."

Referring to these passages, my learned brothers Mockett and Horwill, JJ., have stated in R. T. No. 5 of 1937:

"Even a dying declaration, as has been held by this High Court, is very dangerous material by itself on which to found a conviction."

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These dicta are clearly at variance with the principle on which R. T. No. 112 of 1937 was decided. The learned Public Prosecutor has stated that, so far as he is aware there has not been any case in which it has been held that a dying declaration, proved to have been made and with no reason shown for distrusting its truth, was insufficient to warrant a conviction. Such a case as *Gula Ella Reddi* v. *Emperor*[1], is no exception to this rule, for there the dying declaration was found to be unsatisfactory in itself. On the other hand, there are many cases in which dying declarations alone have been relied upon as justifying conviction. The learned Public Prosecutor brought to our notice the views expressed in the cases of *Emperor* v. *Akbarali Karimbhai*[2], *Naimuddin Biswas* v. *Emperor*[3] and the *King* v. *Maung Po Thi*[4].

It is clear that by the provisions of S. 32 (1) of the Evidence Act the statements made by Nammalwar Naicker in this case are evidence. There are very good reasons for believing them to be true, and none for disbelieving them. With respect, we do not think we should be acting dangerously or imprudently, if relying on these statements we confirmed the convictions of the appellants in this case.

As however there is a conflict between the decision in R. T. No. 112 of 1937 and the observations in Crl. Apps. Nos. 653 of 1935 and 148 of 1936 with regard to the question whether statements made by a person who is dead, uncorroborated by any other evidence, can support a conviction, we order, under r. 2 of the Appellate Side Rules, that this matter be referred to a Full Bench.

The records will be laid before His Lordship the Chief Justice.

This case came on for hearing in pursuance of the above order before the Full Bench.

E. R. Balakrishnan for Accused.

The Public Prosecutor for the Crown.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—In order to appreciate the question which has been referred, it is necessary to state certain of the facts. The appellants have been convicted of murder. The first, second and fourth appellants have been sentenced to death and the third and fifth appellants to transportation for life. Between 5 and 6 o'clock on the morning of the 31st March, 1939, one Nammalwar Naicker was attacked by a band of men and received 38 injuries from which he died shortly

1. (1935) M.W.N. 1089.
2. (1933) I.L.R. 58 Bom. 31.
3. I.L.R. (1937) 1 Cal. 475.
4. A.I.R. 1938 Rang. 282.

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after midnight. As the result of his cries three persons who were in the vicinity were attracted to the spot where the deceased was lying. They had not seen the assault, but they said that they had seen five persons running away. When these witnesses reached the deceased, he told them that he had been attacked by five men and gave their names and the names of their fathers. The names given were the names of the five appellants. One of these witnesses went and called the deceased's brother-in-law and another person, both of whom also gave evidence. These two witnesses went to the spot and the deceased informed them that the appellants were his assailants. The Village Munsif was called to the scene of the crime at about 8 A.M. and recorded a statement made by the deceased. In that statement also the deceased implicated the appellants. The deceased was removed to the Hospital at Ettiyapuram and at about 2-30 P.M. his dying declaration was recorded by a Magistrate. In that statement the deceased again said that his assailants were the appellants. It was proved that there was enmity between the deceased and the appellants, who are of the Marava caste, but they were not the only members of that caste with whom he was at enmity. The question of law which arises is whether on the statements of a deceased person of the nature of those indicated without other testimony, except as to the number of the assailants, the appellants can be convicted of murder. The question has been referred to a Full Bench because the judgments of two Division Benches of this Court are in conflict. Neither of these judgments has been reported.

The first of the two cases which have given rise to this reference is Crl. App. No. 653 of 1935 which was decided by Beasley, C. J. and Gentle, J. The judgment was delivered by Gentle, J., who after quoting from Taylor on Evidence and referring to *Emperor* v. *Akbarali Karimbhai*[1], In re *Dabbukota and six others*[2] and *Gula Ella Reddi* v. *King-Emperor*[3], observed:

"Whilst the contents of a dying declaration can be relied upon as evidence for the prosecution, in the absence of any corroboration of its contents, it is clear from the authorities and text books that it is dangerous, imprudent and opposed to practice to do so, even when no justifiable criticisms can be levelled against the declaration."

1. (1933) I.L.R. 58 Bom. 31.
2. (1905) 2 Weir 753.
3. (1935) M.W.N. 1089.

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The judgment which is in conflict is the judgment in R. T. No. 112 of 1937, which was delivered by Burn, J., and in which I concurred. In that case, there was no corroboration of a dying declaration, but the facts were such that my learned brother and I had no hesitation in accepting it as reliable evidence and upheld the conviction of the accused. The question at issue has been fully argued before this Full Bench and I am unable to accept the observations which I have just quoted from the judgment of Gentle, J., as correctly stating the position. With great respect I regard the statement as being far too wide.

S. 32 of the Indian Evidence Act says that statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in certain specified cases. The first case specified is when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, where the cause of death comes into question. The section declares that such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question. Therefore a statement made by a person who is dead as to the cause of his death is evidence notwithstanding that he was not under expectation of death when he made it.

There are two other sections of the Evidence Act which may have important bearing in a case of this nature, namely, Ss. 157 and 158. S. 157 says:

"In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

S. 158 is in these words:—

"Whenever any statement, relevant under S. 32 or 33, is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested."

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There may not be corroboration of the nature contemplated by S. 157, or matters provable under S. 158, and the only direct evidence may be a statement by the deceased made admissible by S. 32. It does not, however, necessarily follow that this evidence is insufficient to support a conviction. In such a case the surrounding circumstances will have an important bearing. The evidence of an accomplice is tainted, and S. 114 of the Evidence Act [illustration (*b*)] says that the Court may presume that he is unworthy of credit unless corroborated, but a dying declaration is on a much higher plane and the Act places no such restriction on its acceptance.

The reference which Gentle, J., made to Taylor on Evidence consisted of a quotation from S. 722 of the 11th Edition. This section deals with dying declarations and the quotation was as follows:—

"It should always be recollected that the accused has not the power of cross-examination, a power quite as essential to the eliciting of the truth as the obligation of an oath can be; and that where a witness has not a deep sense of accountability to his Maker, feelings of anger or revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may affect the accuracy of his statements, and give a false colouring to the whole transaction."

This, of course, may be the case, but I should regard a statement by a person who has received a mortal wound, made immediately after the injury was caused, as being of high probative value when it relates to the cause of the injury, unless there is some reason shown to doubt its truth. The probative value of a statement of a person who has been mortally injured, but made after a considerable interval, during which time he has been surrounded by his relatives and friends, is certainly much less, but here again it seems to me it may be accepted if it fits in with earlier statements made when he could not have been influenced and they are otherwise unimpeachable.

In *Emperor* v. *Akbarali Karimbhai*[1], Beaumont, C. J., observed:

"Generally speaking, and as a rule of prudence, I am of opinion that a declaration, relevant under S. 32, but not made by one in immediate expectation of death, and not made in the presence of the accused, ought not to be acted upon unless there is some reliable corroboration"

The learned Chief Justice, however, agreed that there is no rule which requires that a dying declaration should not be acted

1. (1933) I.L.R. 58 Bom. 31.

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upon unless it is corroborated and he pointed out that the evidential value of a declaration relevant under S. 32 varies very much in accordance with the circumstances in which it is made. Here I respectfully agree, but I am not prepared to go so far as to say that a declaration relevant under S. 32, though not made in immediate expectation of death and not made in the presence of the accused, necessarily requires corroboration.

In In re *Dabbukota and six others*[1], it was said:

> "It is to be remembered that though dying declarations are in some respects deserving of a degree of consideration and credence to which ordinary statements are not, they are not subject to the test of cross-examination, and, if not substantially borne out by independent evidence and the probabilities of the case, or admitted facts, are worth little or nothing."

By this I presume is meant there must be corroboration before a dying declaration can be accepted. I have said sufficient to indicate that this statement is far too sweeping and it is open to the further objection that it offends against the law of evidence in India.

With regard to the case of *Gula Ella Reddi* v. *The King Emperor*[2], all that need be said is that the circumstances showed that it was unsafe to convict the accused on the bare dying declaration put in evidence in that case and naturally it was not accepted as being sufficient to prove the case for the Crown.

In my judgment it is not possible to lay down any hard and fast rule as to when a dying declaration should be accepted, beyond saying that each case must be decided in the light of the other facts and the surrounding circumstances, but if the Court, after taking everything into consideration, is convinced that the statement is true, it is its duty to convict, notwithstanding that there is no corroboration in the true sense. The Court must, of course, be fully convinced of the truth of the statement and naturally it could not be fully convinced if there were anything in the other evidence or in the surrounding mstances to raise suspicion as to its credibility.

I would answer the reference in this sense.

Lakshmana Rao, J.—I agree.

Krishnaswami Aiyangar, J.—I agree.

[In view of the Full Bench decision, the sentences were confirmed and the appeals dismissed.]

K. S.　*Reference answered.*

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1. (1905) 2 Weir 753.　2. (1935) M.W.N. 1089.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Peri. Su. Aru. Peria Karuppan Chettiar .. *Appellant** (*5th Defendant*)

v.

Doraiswamy Naicken and others .. *Respondents* (*2nd Plaintiff and Defendants 2 to 4*).

Peria Karuppan Chettiar *v.* Doraiswamy Naicken.

Limitation Act (IX of 1908), S. 20 (2)—Mortgage suit—Application for final decree after time—Receipt of rents by mortgagee as owner under private sale—If payment within meaning of S. 20—If preliminary decree satisfied by such purchase—If saves application from bar of limitation.

The first respondent having obtained a preliminary mortgage decree on 8th April, 1926, filed an application for the passing of the final decree for sale on 27th October, 1933. The appellant who had even before the institution of the mortgage suit attached the same property in execution of his money decree and purchased it in execution on 6th July, 1931, opposed the application as barred by limitation. The respondent contended that as he was placed in possession of the mortgaged property in pursuance of a private sale from the mortgagor in July, 1926, pending the attachment in execution of the appellant's decree, his receipt of rents and profits of the property should be regarded as payments by the mortgagor within the meaning of S. 20 (2), Limitation Act, so as to extend the period of limitation each time such rents and profits were received.

Held, it cannot be said that the receipt of rents by the respondent as the owner of the property under his purchase from the judgment-debtor was a payment within the meaning of S. 20.

Mohamad Yusuf v. *Narayana Pillai*, (1937) 2 M.L.J. 170 and *Fallesatha Banu* v. *Muhammad Rashidhuddhin Quraishi*, (1934) 153 I.C. 462, applied.

Bamacharan v. *Nimai*, (1921) 35 C.L.J. 58 and *Mariyappa Nadar* v. *Ramanuja Naick*, A.I.R. 1938 Mad. 465, distinguished.

Held also, that the preliminary mortgage decree could not be deemed to have been satisfied by the private purchase from the mortgagor so as to stop the running of time.

Singa Raja v. *Pethu Raja*, (1918) 35 M.L.J. 579: I.L.R. 42 Mad. 61, applied.

Appeal against the decree of the District Court of Coimbatore in A. S. No. 222 of 1934, preferred against the order of the Court of the Subordinate Judge of Coimbatore dated 27th January, 1934 and made in I. A. No. 764 of 1933 in O. S. No. 221 of 1925.

S. Ramachandra Aiyar for Appellant.

A. C. Sampath Aiyangar for Respondents.

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* S. A. No. 585 of 1936. 31st October, 1939.

Peria Karuppan Chettiar v. Doraiswamy Naicken.

The Court delivered the following

JUDGMENT.—The only question arising in this appeal is one of limitation. The first respondent having obtained a preliminary mortgage decree on 8th April, 1926, filed an application for the passing of the final decree for sale on 27th of October, 1933. The appellant who had even before the institution of the mortgage suit attached the same property in execution of his money decree and purchased it in execution on 6th July, 1931, opposed the application as barred by limitation. Both the Courts below have held that the application is not barred and passed a final decree for sale. Against that decree this appeal has been preferred.

The appellant's learned Counsel contends that both the grounds on which the Court below has overruled the plea of limitation are erroneous and unsustainable, while the first respondent's learned Counsel maintains that they are valid. The time fixed for payment under the preliminary decree having expired on 8th October, 1926, the application for final decree made in October, 1933, is *prima facie* barred but the respondent invokes S. 20 (2) of the Limitation Act and contends that, inasmuch as he was placed in possession of the mortgaged property in pursuance of a private sale from the mortgagor in July, 1926, pending the attachment in execution of the appellant's decree, his receipt of the rents and profits of the property should be regarded as payments by the mortgagor within the meaning of that section so as to extend the period of limitation each time such rents and profits were received. This contention cannot be accepted as it has been held by this Court in *Mohamad Yusuf* v. *Narayana Pillai*[1] and *Fallesatha Banu* v. *Muhammad Rashidhuddhin Quraishi*[2] that the provisions of S. 20 (2) apply only when the mortgagee is in possession of the property and receives the rents and profits thereof as a mortgagee but not where he is in possession and receives the rents and profits in his own absolute right as against the mortgagor, though it may turn out to be the case that such right cannot prevail against the title of a third party. In view of these decisions, it cannot be said that the receipt of rents by the respondent as the owner of the property under his purchase from the judgment-debtor was a payment within the meaning of S. 20.

1. (1937) 2 M.L.J. 170.

2. (1934) 153 I.C. 462.

Peria Karuppan Chettiar v. Doraiswamy Naicken.

The first respondent's learned Counsel has placed reliance in support of his contention on *Bamacharan* v. *Nimai*[1]. But, in that case, the sale to the mortgagee was not completed so that the relationship of mortgagor and mortgagee between the parties still continued to subsist. The decision therefore does not assist the respondent in this case. It was distinguished on this ground in *Mohamad Yusuf* v. *Narayana Pillai*[2].

The first respondent's counsel also relied on the decision of Horwill, J., reported in *Mariyappa Nadar* v. *Ramanuja Naick*[3], but the facts of that case were entirely different and it has no application here as there is no question of estoppel or taking up of inconsistent positions.

The second ground urged for getting over the bar of limitation is that the first respondent's decree must be deemed to have been satisfied by the private sale of the property to him in July, 1926, and that it was only when the appellant purchased the property in Court auction in execution of his own decree in July, 1931, that the liability under the preliminary mortgage decree was revived. This argument proceeds, in my opinion, upon a misconception of the true position so far as the decree is concerned. There is no question here of setting aside any sale which previously operated as a satisfaction of the decree. The private purchase by the respondent was, to his knowledge, always subject to the infirmity that it was liable, by virtue of S. 64, Civil Procedure Code, to be superseded by the appellant bringing the property to sale in pursuance of his attachment in the execution of his own decree. It cannot therefore be said that there was any satisfaction of the decree and such satisfaction has since been set aside so as to revive that decree. Moreover, it has been held in this Court that O. 34, r. 5 of the Code recognises only one method of payment, namely, payment into Court, of the amount fixed by a preliminary mortgage decree and that in default of such payment, the Court is bound on the application of the decree-holder to pass a final decree for sale—see *Singa Raja* v. *Pethu Raja*[4]. Therefore, the preliminary mortgage decree could not be deemed to have been satisfied by the private purchase from the mortgagor so as to stop the running of time, and there was nothing to preclude the

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1. (1921) 35 C.L.J. 58.
2. (1937) 2 M.L.J. 170.
3. A.I.R. 1938 Mad. 465.
4. (1918) 35 M.L.J. 579: I.L.R. 42 Mad. 61.

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respondent from filing the application for the passing of the final decree after the 8th of October, 1926. This contention also fails.

The respondents' counsel lastly urged that, in any case, as there have been successive acknowledgments or payments under Ss. 19 and 20, there can be no bar of limitation. He relies upon the payment of costs by the appellant as the fifth defendant in the mortgage suit in October, 1928, and the subsequent acknowledgment of the mortgage-debt in Ex. E, the execution application filed by the appellant in February, 1930, in which it was stated that the property was subject to the mortgage in favour of the first respondent. But the payment in October, 1928, cannot avail the respondent as it is not evidenced by any writing as required by S. 20 of the Limitation Act and it is clear that, if the payment in October, 1928, cannot be relied on, Ex. E will be of no use.

The appeal therefore succeeds and is allowed with costs throughout.

Leave to appeal granted.

K. S. —— *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD THANKERTON, LORD ROMER AND SIR GEORGE RANKIN.

The Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan .. *Appellant**

v.

The Ahmedabad Advance Mills, Ltd. .. *Respondents.*

P.C.

Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan *v.* Ahmedabad Advance Mills, Ltd.

Indian Income-tax Act (XI of 1922), S. 4—Bonds held by Indian company—Interest payable in England used for purchase of plant in England—Plant sent to company in India for use in business—Whether "interest received in British India" and liable to tax.

The respondents who carried on the business of cotton spinners and weavers in British India, owned certain sterling bonds of the Government of India, the interest on which was payable in England. The interest for the year in question having been paid in England to agents of the respondent company, was used for the purchase of mill stores and machinery which was sent out to the respondents in India. The Crown sought to tax this as "Income brought into British India."

Held, what the Act charges with tax is income and nothing but income, whether that income accrues or arises or is received in British India or is

* P. C. Appeal No. 19 of 1939. 14th November, 1939.

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deemed so to arise or accrue or be received by reason of being brought into British India. But if income arising or accruing without British India, is spent or otherwise dealt with that it ceases to be income instead of being brought into British India, it is not chargeable under the Act, merely because the thing upon which it has been expended or into which it has been turned is subsequently brought there.

Appeal from a decision of the High Court, Bombay, dated 27th September, 1937 (Beaumont, C.J. and Blackwell, J.) on a referenee under S. 66 (2) of the Indian Income-tax Act, 1922.

The respondents, Ahmedabad Advance Mills, Ltd., carried on the business of cotton spinners and weavers in British India, and owned certain sterling bonds of the Government of India, the interest on which was payable in England. The interest on those bonds having in the year ending the 31st March, 1934, been paid in England to agents of the respondent company, the latter used it for the purchase there of mill stores and machinery which they had sent out to them in India. The Income-tax Officer having assessed the respondents to tax for the year in question on the amount of interest so expended, as being "income brought into British India" within the meaning of S. 4 (2) of the Act of 1922, the company appealed to the Assistant Commissioner who dismissed the appeal. The Commissioner of Income-tax then, at the request of the company referred the matter to the High Court under S. 66 (2) of the Act, expressing his own opinion as being in favour of the Crown. The High Court having discharged the assessment, the Crown now appealed to His Majesty.

J. M. Tucker, K. C. and *Hubert Hull* for Appellant.—In effect the income received by the respondent company in England by way of interest on their bonds has been brought into British India by them. After they have used that interest to buy machinery and stores those goods represent the interest, they arrive in India so representing it. It is submitted, therefore, that, logically, the interest from the bonds must be said to be income which has been received in India. The company seek to escape liability by arguing that the goods are to be used by them in connection with their business. It is, however, submitted that the use to which they are to be put is immaterial, for nothing can do away with the fact that they arise in British India directly emanating from or representing the income which was received outside British India. Counsel referred to *Subramaniam Chettiar* v. *The Commissioner of Income-tax, Madras*[1].

R. P. Hills for Respondents.—The interest in question was paid to the respondents in England and used by them there to

1. (1935) 69 M.L.J. 844: I.L.R. 59 Mad. 171 (F.B.).

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purchase goods. It is a fallacy to regard that income as still being in existence after the purchase, for it then ceased to be income in the respondents' hands. Consequently, the bringing of the goods into India did not amount to a bringing there of the income which they no longer possessed. While admittedly income accrued abroad may be chargeable in India although it is brought there in a form different from that in which it is received, yet the statute aims only at cases where the income in question is transmitted to India as money by some method recognised generally among commercial men as the means of transmitting money from one country to another, not only were the goods not brought to India to be converted into money but there is no evidence that they would have been converted into a sum representing the interest which had been received from England.

14th November, 1939. Their Lordships' judgment was delivered by

Lord Romer.

LORD ROMER.—The respondents, who carry on the business of cotton spinners and weavers in British India, are the owners of certain sterling bonds of the Government of India the interest on which is payable in England.

In the year ending the 31st March, 1936, interest on such bonds was paid in sterling in England to certain agents of the respondents, the amount of such interest expressed in rupees being Rs. 18,333. This sum was expended by such agents in the purchase in England on behalf of the respondents of certain mill stores and machinery which were then sent to the respondents in British India and there used by them for the purposes of their business.

In these circumstances the Income-tax officer in assessing the respondents to income-tax for the year of assessment 1936-7 included in their income for the year 1935-6 the sum of Rs. 18,333 as being income "brought into British India" within the meaning of S. 4 (2) of the Indian Income-tax Act, 1922.

It will be convenient at this stage to set out S. 3 of the Act and the material portions of S. 4 as these sections stood in the year of assessment.

S. 3.—Where any Act of the Indian Legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at the rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of all income, profits and gains of the previous year of every individual Hindu undivided family, company, firm and other association of individuals.

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S. 4 (1).—Save as hereinafter provided, this Act shall apply to all income, profits, or gains, as described or comprised in Section 6, from whatever source derived, accruing or arising, or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India.

(2) Income, profits and gains accruing or arising without British India to a person resident in British India shall, if they are received in or brought into British India, be deemed to have accrued or arisen in British India and to be income, profits and gains of the year in which they are so received or brought notwithstanding the fact that they did not so accrue or arise in that year.

The respondents in due course appealed to the Assistant Commissioner against the assessment in respect of the Rs. 18,333, but he dismissed the appeal and confirmed the assessment.

The respondents then applied to the Commissioner of Income-tax, Bombay Presidency, to refer a question of law with respect to their liability to be assessed to income-tax in respect of the amount in question to the High Court under section 66 (2) of the Act. The Commissioner accordingly made a reference of the following question:—

"Whether in the circumstances of the case the Income-tax officer has rightly included in the income liable to tax the amount of Rs. 18,333 on account of interest on sterling securities on the ground that though the said income accrued or arose in England it was received or brought into British India within the meaning of Section 4 (2) of the Act."

In making the reference the Commissioner, as required by the Act, expressed his own opinion upon the question referred. His opinion was that the answer to the question should be in the affirmative.

The reference in due course came before the High Court before Beaumont, C.J. and Blackwell, J. and on the 27th September, 1937, the Court gave judgment answering this question that had been referred to them in the negative.

In so doing the High Court was, in their Lordships' opinion, plainly right. What the Act charges with tax is income and nothing but income, whether that income accrues or arises or is received in British India or is deemed so to arise or accrue or be received by reason of being brought into British India. But if income arising or accruing without British India is spent or otherwise so dealt with that it ceases to be income instead of being brought into British India, it is not, in their Lordships' judgment, chargeable under the Act merely because the thing upon which it has been expended or into which it has

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been turned is subsequently brought there. It is not necessary, of course, in order to attract tax that income received abroad should be brought into India in the exact form in which it has been received. As was said by Beaumont, C.J., in his judgment in the present case:

"Foreign income may be received in sterling or francs or dollars and may be brought into India in the form of rupees or income received abroad may be remitted to India by means of a banker's draft. To use Lord Brampton's phrase in *Gresham Life Assurance Society, Ltd.* v. *Bishop*[1], the income may be received '*in specie* or in any form known to the commercial world for the transmission of money from one country or place to another'."

Much to the same effect was said by Lord Lindley in the same case.

"A sum of money" [he said] "may be received in more ways than one, for example, by the transfer of a coin or a negotiable instrument or other document which represents and produces coin, and is treated as such by business men. Even a settlement in account may be equivalent to a receipt of a sum of money although no money may pass."

Other examples can readily be imagined. Beaumont, C.J., indeed, suggested the case of an assessee, who was desirous of bringing into British India foreign income for use there as income, purchasing bonds with the foreign income, bringing the bonds to India, and then selling them and applying the proceeds as income. It is possible that such a case might occur, although it would give rise to the question, among others, whether the sum to be brought into tax in India should be the sum expended on the bonds in the foreign country or the proceeds of the bonds received in India. That question can be dealt with when it arises. It does not arise here. It is not and cannot be suggested in the present case that the mill stores and machinery were purchased in England and shipped out to India as a method of bringing over the sterling interest that had been received in this country. No one in his senses would think of employing such a method of transmitting money. But apart from the inherent improbability of the thing it is found as a fact by the Commissioner that the mill stores and machinery were required by the respondents for their business in India, and it is not suggested that they will be sold or will be employed otherwise than in and for the purposes of the respondents' mills.

It is, however, contended on the part of the appellant that the use to which the stores and machinery are put in India is

1. (1902) A.C. 287.

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immaterial. They were bought, says the appellant, with the sterling equivalent of Rs. 18,333 and whatever their value, whatever the intention with which they were bought, whatever the purpose to which they are now being put, their arrival in India resulted in Rs. 18,333 foreign income being brought into British India.

Their Lordships are not prepared to accept so extravagant a contention. To show how extravagant it is many illustrations might be given. It will be sufficient to take one suggested by Mr. Hills in the course of his argument before their Lordships. A resident in British India when on a visit to this country receives here the sum of £500 sterling as interest on British Government Stock. He expends it here in replenishing his wardrobe and in purchasing a motor car. At the end of two years he returns to British India taking with him the garments and the motor car. The garments have been worn for two years and the car in that time may have been driven 40,000 miles or more. Yet if the appellant is right the person in question will on his return to India be deemed to have brought back with him the £500 interest that he received in this country. The truth of the matter is that in such a case he does not bring back into India a penny of the £500. He has spent it all in England. If upon his return to India the question were put to him, "How much have you left of the £500?" his answer would be "none," and the answer would be a true one whether addressed to a casual enquirer or to the Income-tax officer. What he has taken back to India are some much worn clothes and a car much depreciated in value. But these things can in no sense be described as income; and it is only income that can be taxed under the India Income-tax Act.

For these reasons their Lordships are of opinion, and will humbly advise His Majesty, that this appeal should be dismissed. The respondents' costs of the appeal must be paid by the appellant.

Solicitors for Appellant: *The Solicitor, India Office.*

Solicitors for Respondents: *Lattey and Dawe.*

R.C.C.
K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Karankattil Haji Thambilava Ismal Rowthen's son Chinnappayan *alias* Muhammad Rowthen (dead) and others .. *Appellants* (Petitioner-Defendant and his Legal Representatives)*

v.

Karumannasseri Gramam Parasurama Pattar's son Narayana Pattar .. *Respondent (Respondent-Decree-holder).*

Chinnappayan *v.* Narayana Pattar.

Mortgage—Usufructuary mortgage—Lease back to mortgagor—Arrears of rent subsequent to period of lease—Claim to recover arrears—Equity of redemption brought to sale in execution—Previous application for execution in another decree between the same parties for arrears of rent before the lease expired—Principle of res judicata *how far applicable—O. 34, r. 14, Civil Procedure Code (V of 1908), applicable.*

It is well established that when a lease back is part of a transaction of a mortgage and is merely a piece of machinery for realising the interest on the mortgage, a suit for rent under that lease would in fact be a suit to realise the interest on the mortgage and under a decree in such a suit the equity of redemption could not be brought to sale unless the suit was actually framed as a suit on the mortgage.

Where the appellant mortgaged his property usufructuarily to the respondent by a deed on a certain date and by another deed on the next day the property was leased back to him by the mortgagee, and the lease was for a period of one year and the question of the relationship between the lease and the mortgage came up in a previous litigation for recovery of arrears of rent by the lessor-mortgagee, which was objected to in execution when the equity of redemption was brought to sale on the strength of O. 34, r. 14 and the objection was upheld, and a later decree obtained in the present suit for recovery of arrears of rent accumulating subsequently when the same objection under O. 34, r. 14 was raised along with another objection on the ground of bar by *res judicata* owing to the previous decision on the same question,

Held, (1) that reading the two deeds of mortgage and lease together, they were both part of the same bargain and the lease was intended to implement the undertakings of the mortgage. Instead of providing for a simple mortgage with payment of interest in cash, the common device was employed of drafting the mortgage as ausufructuary mortgage and making the mortgagor a tenant paying rent. The transaction was in its essence a mortgage in which interest was collected in the shape of rent.

(2) The rule of *res judicata* in S. 11, Civil Procedure Code, applies directly when the decision of a question arises in part of the proceedings in

* C.M.S.A. Nos. 121 and 122 of 1937. 27th July, 1939.

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one suit and an attempt is made to raise the same matter at a similar stage of the proceedings in a subsequent suit.

Ram Kirpal v. *Rup Kuari*, (1883) L.R. 11 I.A. 37: I.L.R. 6 All. 269 (P.C.), referred to.

(3) That since the rent claimed after the expiry of the period of lease was in its essence a sum of money due under the mortgage, O. 34, r. 14, Civil Procedure Code, would still apply. Because the claim of the mortgagee was in effect the interest due on the mortgage, he could not recover it by sale of the equity of redemption otherwise than under a mortgage decree.

Appeals against the decrees of the Court of the Subordinate Judge of South Malabar at Palghat in A. S. Nos. 32 and 31 of 1937 respectively (A. S. Nos. 390 and 389 of 1936 District Court) preferred against the orders of the Court of the District Munsif of Alathur, dated 27th and 30th October, 1936, respectively and made in E. A. No. 2071 of 1936 and E. P. No. 509 of 1936 in O. S. No. 215 of 1934 respectively.

K. Kuttikrishna Menon and *K. V. Gopalakrishnan Nair* for Appellants.

P. S. Narayanaswami Aiyar and *P.R. Narayana Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—These appeals arise out of an order allowing the execution of a decree for arrears of rent obtained by a usufructuary mortgagee against his mortgagor who is the lessee of the hypotheca. In the execution petition the mortgagee sought to bring to sale the equity of redemption in the mortgaged property in order to realise the decree for arrears of rent. An objection, which was disallowed in the lower appellate Court, was based on O. 34, r. 14, Civil Procedure Code, to the effect that the decree was in fact a decree for payment of money in satisfaction of a claim arising under the mortgage and that therefore the decree-holder was not entitled to bring the mortgaged property to sale otherwise than by a suit for sale in enforcement of the mortgage.

The appellant (mortgagor-lessee) mortgaged his property usufructuarily to the respondent by a deed dated 30th November, 1930 and by another deed dated 1st December, 1930, the mortgagee leased the property back to the mortgagor. The mortgage itself provides for redemption on the 1st Kumbham 1107 or any date up to the 30th of that month or during the same period in successive years. The lease is for a period of one year ending on the 1st Kumbham 1107 on which date the

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lessee undertakes to surrender the property. The liabilities undertaken by the mortgagee in respect of Government revenue, *michavaram*, etc., under the mortgage deed are the subject of special covenants in the lease deed. The question of the relation between the lease and this mortgage has come up for consideration in a previous litigation arising out of the lease. The rent due under the lease deed was not paid and the lessor-mortgagee filed a small cause suit for the arrears and got a decree which was executed on the original side of the Sub-Court. In execution the decree-holder sought to bring to sale the equity of redemption in the mortgaged property. An objection was preferred on the strength of O. 34, r. 14, Civil Procedure Code. On this petition the Subordinate Judge passed orders holding that the application for sale was barred under O. 34, r. 14 and allowed the objection petition. The judgment in this matter is Ex. A. The execution with which we are now concerned was under the decree in a later suit O. S. No. 215 of 1934, the arrears in question being arrears of rent for years subsequent to the year actually covered by the lease. The execution petition was filed in the Court of the District Munsif and the same objection under O. 34, r. 14 was taken to the application to bring to sale the equity of redemption. It was also objected that the application was barred by *res judicata* by reason of the former order Ex. A. The trial Court upheld the objection but the learned Subordinate Judge has allowed the execution to proceed.

It is, I think, well established that when a lease back is part of a transaction of mortgage and is merely a piece of machinery for realising the interest on the mortgage, a suit for rent under that lease would in fact be a suit to realise the interest on the mortgage and under a decree in such a suit the equity of redemption could not be brought to sale unless the suit was actually framed as a suit on the mortgage. It is however contended that this lease must not be regarded as part of the mortgage transaction and that it is an entirely separate transaction on a different date with features which indicate an intention that it should not be merely a portion of the mortgage transaction. The differences upon which the learned Subordinate Judge relies are as follows:—Firstly, there is an interval of one day between the two deeds. Secondly, there is the difference in the period of the lease which is for one year only.

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Whereas the mortgage is redeemable at the end of the same period or at subsequent dates. Thirdly, there is the fact that the lease provides for the payment of what is called *Kattakanam* which, I am informed, means an advance paid as security for future rents. It seems to me that the fact that the mortgage was on one day and the lease on the next day has very little bearing on the question whether the lease and the mortgage form part of the same transaction, more especially in the circumstances of the present case wherein the standing crops on the land were to be reaped by the mortgagor, so that both the full possession of the property and the actual effect of the lease were to begin at a subsequent date when the standing crops were harvested. Nor do I think the fact that an advance by way of security for rent was paid necessarily makes the lease something separable from the mortgage. And as to the difference in the term the fact that the lease is expressed as ending on the same date as the date on which the right of redemption begins, is to my mind a clear indication that both the deeds form part of one and the same transaction. Reading these two documents together I have no doubt in fact that they are both part of the same bargain and that the lease was intended to implement the undertakings of the mortgage. Instead of providing for a simple mortgage with payment of interest in cash, the common device was employed of drafting the mortgage as a usufructuary mortgage and making the mortgagor a tenant paying rent. The transaction was in its essence a mortgage in which interest was collected in the shape of rent.

Moreover it seems to me that it is not open to the respondent to contest the identity of the transaction of lease with the transaction of mortgage. The matter was thrashed out at length between the same parties in connection with the same transaction in the execution petition in a former suit for rent. It is contended that though the principle of *res judicata* applies to successive execution petitions in the same suit under the same decree, there is no *res judicata* in respect of a decision in an execution petition under a former decree when the same matter arises for decision in an execution petition under a subsequent decree. This contention seems to me to overlook the essential basis of the rulings with reference to the applicability of the principle of *res judicata* to proceedings in execution. The diffi-

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culty which arose in applying the principle of *res judicata* to execution proceedings arose from the fact that successive execution petitions in the same suit could not be regarded strictly speaking as decisions in successive suits between the same parties. Therefore in terms S. 11, Civil Procedure Code, had no application. But it was held that though the precise rule embodied in S. 11 did not apply, the parties were governed by the principle that when in one stage of a suit a matter had been finally decided, the same matter could not be agitated again in a subsequent stage of the same suit. But when we are concerned with the decision of an issue between the same parties in a prior execution petition under a different and anterior decree, this difficulty does not arise. What we have is the decision of a question arising in part of the proceedings in one suit and an attempt to raise the same matter at a similar stage of the proceedings in a subsequent suit. The principle of S. 11 applies directly and it is unnecessary to call in aid the reasoning of the Privy Council in *Ram Kirpal* v. *Rup Kuari*[1], and subsequent cases as to the application of the same rule by analogy to successive stages of the same suit.

The most that can be said for the decree-holder is that the order Ex. A in the former proceedings only decided that the lease in this case was part of the transaction of mortgage and that in execution of the decree for arrears *under* that lease the hypotheca could not be brought to sale: whereas now we are concerned with the execution of the decree for arrears due from the tenant holding over *after* the expiry of the lease. So that the question is not precisely the same. But in so far as it involves a decision as to the oneness of the transaction of lease with the transaction of mortgage, the matter cannot in my opinion be reopened between the parties. I do not think that it makes any difference to the applicability of O. 34, r. 14 that we are now concerned with arrears of rent due from a tenant holding over after the expiry of the term of the lease. The relation between the parties is still governed by the terms of this lease even though the original period fixed has expired. The rent claimed is still in its essence a sum of money due under the mortgage. Therefore O. 34, r. 14 still applies.

It is however argued that in so far as the decree is a decree for costs this rule will have no application and the respondent

1. (1883) L.R. 11 I.A. 37: I.L.R. 6 All. 269 (P.C.).

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quotes the case in *Haribans Rai* v. *Sri Niwas Naik*[1]. That case is not quite an authority for the position which the respondent takes up. It was a case of a usufructuary mortgagee who was not given possession of the hypotheca and sued for possession and incidentally got a decree both for possession and for costs. It was held that the decree so far as it related to costs was not a decree for money due under the mortgage and that therefore O. 34, r. 14 did not bar its execution by the sale of the hypotheca. The position however is somewhat different here. It is true that the mortgagee is suing for possession but his substantial claim is for arrears of rent and those arrears are, in the view I have taken, an essential part of the mortgage amount. By the analogy of O. 34, r. 10 the decree in so far as it is a decree for costs must be deemed to be added to the claim under the mortgage even though the suit is not in terms a suit based on the mortgage. I do not think that there are any grounds for separating the costs on the relief for possession from the costs in the rest of the suit. The essential thing which the mortgagee wishes to recover is the money due from his tenant which is in effect the interest due on his mortgage. This he cannot recover by sale of the equity of redemption otherwise than under a mortgage decree.

In this view I allow the appeal, set aside the order of the lower appellate Court and restore the order of the District Munsif dismissing the execution petition and allowing the objection with costs throughout (in A.A A.O. No. 121 of 1937 only).

Leave granted.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Ponnuchami Chetti and others .. *Appellants** (*Defendants 1, 2 and 4*)

v.

Annakamu Servai and another .. *Respondents* (*Plaintiff and 3rd Defendant*).

Ponnuchami Chetti v. Annakamu Servai.

Madras Estates Land Act (I of 1908), S. 112—Sale under, bad for want of proper service of notice—Person interested in land but not registered pattadar—Right to bring suit in Civil Court to declare sale invalid—Suit whether one under the Estates Land Act or under the general law.

1. (1913) I.L.R. 35 All. 518.

* S. A. No. 1041 of 1937. 11th October, 1939.

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Where a sale under S. 112 of the Madras Estates Land Act is bad for want of proper service of notice there is nothing either in the Estates Land Act or under the general law to prevent any person who has an interest in the land such as a possessory title which is adversely affected by the sale from challenging that sale in the ordinary Civil Courts and protecting his interest, though he is not the registered pattadar.

Seetharama Naidu v. *Govindaswami Chettiar*, (1925) 23 L.W. 149, relied on.

Such a suit is not a suit under the Estates Land Act but a suit under the ordinary law to protect the rights of a person having an interest in land, which rights are threatened by a sale purporting to have been held under the powers conferred by S. 112 of the Estates Land Act.

Appeal against the decree of the Court of the Subordinate Judge of Dindigul in A. S. No. 3 of 1937 preferred against the decree of the Court of the District Munsif of Dindigul in O. S. No. 35 of 1936.

T. R. Venkatarama Sastri, K. Rajah Aiyar and *K. Muthuswami Aiyar* for Appellants.

V. Ramaswami Aiyar and *K. S. Ramamurthi* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal raises the question of the right of a person, who is interested in land but is not the registered pattadar thereof, to bring a suit in the Civil Court to declare a sale held under S. 112 of the Estates Land Act to be invalid and to obtain an injunction protecting his possession. The essential facts of this case are that the two items in suit were originally acquired under an insolvency sale by one Solaimalai who let the plaintiff into possession under an agreement to sell. Solaimalai's title ceased by reason of a sale for arrears of rent. The purchaser in the rent sale was one Muthuveerappa who under a private arrangement with the plaintiff allowed the plaintiff to retain possession of the land, though the patta was in Muthuveerappa's name. In 1931 there was a sale for arrears of rent of one of the items which was bought in by the Zamindar, the fourth defendant here. In 1933 there was a similar sale of the other item which also was purchased by the Zamindar. After each of these purchases the plaintiff applied to the Zamindar for patta which was eventually refused and the Zamindar in 1934 granted patta for both numbers to defendants 1 and 2. Thereafter there was trouble about the harvesting of crops and magisterial orders recognised the right of defendants 1 and 2 to the harvest. But it has been found that the plaintiff continued

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in possession up to the time of suit. That finding is one of fact and though it is true that the learned appellate Judge makes a mistake with reference to certain payments of kist made by the plaintiff there are no grounds upon which I could hold that the finding of fact does not bind me in second appeal. It has also been found as a fact that with reference to both the rent sales, which the plaintiff attacked, there was no personal service, no proper attempt to effect personal service and no proof of any valid affixture. As a result of these findings the lower appellate Court decreed the plaintiff's suit. The appellants are defendants 1 and 2 the rival claimants and the fourth defendant the Zamindar.

It must be conceded on the findings of fact that, though the plaintiff's title anterior to the rent sales may have been defective, he was in possession with the permission of the registered pattadar and had a right to hold possession against any one other than the true owner. It is well established that a suit will lie in the Civil Court for a declaration that a sale held under S. 112 of the Madras Estates Land Act is invalid for want of service of notice, which is an essential preliminary to the validity of such a sale. It is strenuously contended by Mr. Venkatarama Sastri for the appellants that such a suit will not lie at the instance of any one other than the person who was entitled to have notice of the sale, that is to say, the registered pattadar. The contention is that a mere occupant who has not been recognised by the landholder has no right to be included in the formalities of a sale under S. 112 and that provided the registered pattadar acquiesces in the sale as one carried out with a sufficient degree of formality, it does not lie in the mouth of the person whose presence on the land has been tolerated by the registered pattadar to question that sale on technical grounds. There is a long series of decisions of this Court to the effect that when a sale is held without due notice as prescribed under S. 112 that sale is invalid. There are decisions to the effect that such a sale is a nullity, the question having arisen usually with reference to limitation. It seems to me unnecessary for the purpose of this case to decide whether a sale which, so far as the Court was concerned, was attended with all due formalities is merely voidable as the result of the failure by the Court's process server to do that which he purports to have done, or whether such a sale would be an absolute nullity which would *bind*

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nobody at all. I am, however, of opinion that when a sale is bad for want of proper service of notice, there is nothing either in the Estates Land Act or under the general law to prevent any person who has an interest in the land which is adversely affected by the sale, from challenging that sale in the ordinary Civil Courts and protecting his interest. Numerous cases have been cited before me dealing with suits to declare such a sale to be invalid. So far as I am aware there is no case in which the right of a person interested who is not the registered pattadar to bring such a suit has been denied. There is one decision of a single Judge *Seetharama Naidu* v. *Govindaswami Chettiar*[1], in which the right of suit by a person other than the registered pattadar has been recognised and an unreported decision (S. A. No. 538 of 1936) has recognised such a right of suit at the instance of a person who though not the registered pattadar had applied to the landholder under S. 146 for recognition. The point seems to me to be this. A suit such as that with which we are dealing is not a suit under the Madras Estates Land Act, which for certain purposes declines to recognise anybody other than the registered pattadar, though for other purposes it recognises persons having an interest who are not the registered pattadars. The present suit is a suit under the ordinary law to protect the rights of a person having an interest in land, which rights are threatened by the alleged illegal act of an authority purporting to act under the colour of the law. Ordinarily speaking when the law gives to a public authority a power to invade the rights of a private individual, it is incumbent upon the public authority to observe those formalities which are prescribed by the law investing it with the powers. If private rights are invaded without the observance of those formalities which are prescribed, the person whose interest is adversely affected by this invasion has a right of suit. This right of suit is not confined to persons with a perfect title to the property which is threatened. Provided that they have such an interest in the property as the law will protect, it can supply the basis for a suit to resist an invasion of that right under the colour of the law, when the law has not actually been followed. Merely because this is a suit to contest the legality of a sale under the Madras Estates Land Act it cannot to my mind be contended that the suit can only be brought by the

1. (1925) 23 L.W. 149.

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person who is a registered pattadar. There is no analogy with suits brought under that Act and the plaintiff is not seeking a remedy provided under that Act. He is suing for the protection of his rights as a person having a possessory title which under the ordinary law the Courts will protect from unauthorised invasions. That title is threatened by a sale purporting to have been held under the powers conferred by S. 112 of the Estates Land Act. The plaintiff is entitled to come to the Court, prove his possessory title and show that the sale which purports to have been a sale under this special law has not been carried out in accordance with that law and therefore can convey no title to the purchaser. It seems to me therefore that the decision of the lower appellate Court is correct and that the plaintiff's suit must succeed on the findings.

In the result the appeal is dismissed with costs of the plaintiff-first respondent.

Leave refused.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Nainalasetti Veera Raju .. *Appellant** *(Plaintiff)*

v.

The Secretary of State for India in Council represented by the Collector of East Godavari at Cocanada .. *Respondent (Defendant).*

Veera Raju v. Secretary of State for India in Council.

Madras Irrigation Cess Act (VII of 1865), S. 1 (b) and proviso 2—Irrigation of land registered under a particular government work—Ryot storing water flowing from that work on his land in a private reservoir—If liable for penalty.

Where a ryot entitled to take water for irrigation from a particular government work stores water flowing from that work on his land in a private reservoir, for irrigating his crop, the use of such water does not justify the imposition of a penal water rate. The charge is leviable not by reason of the detriment to others caused by taking the water but by reason of the source from which the water is taken. The impounding of the water in the private reservoir cannot be held to create a different or additional source other than that assigned by the revenue authorities.

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* S.A. No. 510 of 1936. 26th October, 1939.

Veera Raju *v.* Secretary of State for India in Council.

Per *Patanjali Sastri, J.*—The Act is one entailing penal consequences and should not be applied to any one who is not brought within its express language.

Appeal against the decree of the Court of the Subordinate Judge of Cocanada in A. S. No. 75 of 1935 preferred against the decree of the Court of the District Munsif of Peddapur in O. S. No. 38 of 1934.

V. Govindarajachari for Appellant.

The Government Pleader (B. Sitarama Rao) for Respondent.

The Court delivered the following

Wadsworth, J.

JUDGMENTS: *Wadsworth, J.*—This second appeal raises the question whether the Government are entitled under the Madras Irrigation Cess Act to levy penal assessment in respect of the irrigation of land registered under a particular Government work, by reason of the fact that the ryot has stored the water flowing from that work on to his land in a private reservoir.

The facts are simple. The plaintiff-appellant owns land S. No. 72 registered as wet land under the Mallu Dora tank. Within the boundaries of S. No. 72, there is a small private reservoir which has been in existence for many years. It receives water, flowing through the fields higher up, from the Mallu Dora tank. Below S. No. 72, there is another Government source called the Timmaraju Cheruvu which receives the drainage water flowing through the fields irrigated by the Mallu Dora tank. The plaintiff is admittedly entitled to irrigate his crops in S. No. 72 with water flowing from the Mallu Dora through the fields above. He has however been prohibited by the Government from using water stored in his private reservoir and has been penalised for irrigating his crop with such water. The question is whether this penalty is correct. The Government claim the right to penalise this irrigation on the ground that it is 'using without due authority water from a Government source different from or in addition to that which has been assigned by the Revenue authorities as the source of irrigation of the land'—*see* the second proviso to S. 1 (*b*) of the Act. Clearly in this case, the source which has been assigned to the land is the Mallu Dora tank. The question is whether the use of water from a private reservoir fed from the authorised source is the use of water from a source different

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from or in addition to that authorised: There is no direct authority on this point. It has been pointed out in a recent decision, *Rathnammal* v. *Secretary of State for India in Council*[1], that in order to justify a penalty imposed upon land which is entitled to Government water, it must be proved that there has been a taking from a source different from or in addition to that assigned. The Courts have recognised that the word 'source' covers not merely the river, stream, channel, tank or work, but would include the particular passage by which the water leaves the source. Hence we have the case in which irrigation from a sluice from which the shutter has been forcibly removed has been treated as irrigation from a source different from the authorised source—*Kanniappa Mudaliar* v. *Secretary of State for India*[2]. There is also the case in which irrigation from two pipes inserted in a Government work when only one pipe was authorised, has been held to be irrigation from a source additional to or different from the authorised source—*Krishna Row* v. *The Collector of Krishna*[3]. Our attention has not been drawn to any case in which it has been held that the term 'source' must be taken to include not only the Government work and the passages in that work by which the water is taken to the private land, but also the distributory system upon the private land.

An argument has been built upon the words in cl. (*b*) to the effect that

"whenever water flows into a reservoir and is thereafter used for irrigating any land under cultivation,"

the irrigation is taxable; but it must be remembered that this clause is supplementary to the main cl. (*a*) which refers the power of claiming cess to the supply of water from a work belonging to or constructed by Government. Under cl. (*b*) water flowing through a privately owned reservoir is taxed not because it emanates from the reservoir, but because it emanates from a Government source. It is therefore difficult to hold that the authorised source the supply from which warrants the charge, is the Government work *plus* the private reservoir.

It is contended that the construction of a storage arrangement on private land in this case does have some detrimental

1. (1939) 2 M.L.J. 380.
2. (1935) 69 M.L.J. 728: I.L.R. 59 Mad. 107.
3. (1914) 26 M.L.J. 210.

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effect on the flow of drainage water into the Government tank lower down. But it is difficult to see how this fact alone would justify the imposition of penal water rate. The charge is leviable not by reason of the detriment to others caused by taking the water, but by reason of the source from which the water is taken. Here, the plaintiff undoubtedly has taken no water other than that which comes from the registered source. We find ourselves unable to hold that the impounding of water on the plaintiff's own land, flowing on to that land from the registered source in the authorised manner, can be held to create a different or additional source other than that assigned by the revenue authorities.

In this view, we allow the appeal and give the plaintiff a decree for the refund within three months of the amount collected as penal water rate with costs throughout. No injunction is necessary.

Patanjali Sastri, J.

Patanjali Sastri, J.—I agree. The language of S. 1 (*b*) read with the second proviso to that section is by no means happy or free from ambiguity. But as pointed out in *Rathnammal* v. *Secretary of State for India in Council*[1], the Act is one entailing penal consequences and should not be applied to any one who is not brought within it in express language. I am not satisfied that the language used is so clear as to bring the appellant before us within the mischief of the Act.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Visalakshi Ammal .. *Appellant* (Plaintiff)*

v.

Gokuldas Dayal Sait (deceased) and another .. *Respondents (Defendant and his legal representative).*

Visalakshi Ammal v. Gokuldas Dayal Sait.

Madras District Municipalities Act (V of 1920), S. 61 (1)—Private drains—If vest in Municipal Council—Municipal Council if can sanction connection of drains of other persons to private drains.

S. 61 of the District Municipalities Act does not give the Municipal Council the right to connect or sanction the connection of a stranger's drainage system with that of a person whose own private property it is.

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1. (1939) 2 M.L.J. 380.

* S. A. No. 1082 of 1934. 27th September, 1939.

Visalakshi Ammal v. Gokuldas Dayal Sait.

Arunachala Chettiar v *Municipal Council of Mayavaram*, (1919) 38 M.L.J. 222, relied on.

Gunendra Mohan Ghosh v. *Corporation of Calcutta*, (1916) I.L.R. 44 Cal. 689, distinguished.

Appeal against the decree of the District Court of Salem in A. S. No. 89 of 1932 preferred against the decree of the Court of the District Munsif of Salem in O. S. No. 87 of 1931.

V. N. Venkatavaradachariar for Appellant.

K. Sankara Sastri for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal arises out of a suit filed by the appellant in the Court of the District Munsif of Salem for a declaration that a drain adjoining the eastern wall of her house was her private property and that the defendant-respondent was not entitled to let into the drain sewage from his house. The appellant is the owner of a house which fronts a main road within the Municipal area of Salem. The respondent has also built a house fronting the same road. His property is separated from the appellant's property by a public lane. The respondent applied to the Municipal Council for permission to carry two channels across this public lane and connect them with the drain on the appellant's property. Permission was granted and as the result connections with the appellant's drain were made. The appellant objected, but the work having been carried out she instituted the present suit. The respondent filed a written statement in which he averred that the drain on the appellant's property was a public drain and that the Municipal Council had acted within its powers in sanctioning the connections.

The District Munsif held that the drain was the private property of the appellant and that the respondent had no right to discharge into it the sewage from his house. Consequently, the District Munsif granted the appellant the relief which she sought. The respondent appealed to the District Court of Salem. The District Judge concurred in the finding of the District Munsif that the drain was the private property of the appellant and that finding is now conclusive. But even if it were not, there is no doubt that the drain lies entirely on the appellant's property except to the extent of a connection which has been made with the public drain running in front of the two houses. Before the respondent made the connections complained of the appellant's drain was used entirely for the purpose of draining

the appellant's property. The District Judge allowed the appeal on the construction which he placed on S. 61 (1) of the Madras District Municipalities Act, 1920. He considered that the section operated to vest the drain in the Municipal Council and consequently the Council had the power to allow the respondent or other neighbouring house-holders to conduct the sewage from their houses to this drain. The District Judge, however, thought that it was necessary to ascertain whether the flow of sewage from the respondent's house into this drain constituted a nuisance. This question had not been canvassed in the trial Court, but holding the view that it was necessary to decide this matter, the District Judge called for a finding from the District Munsif. The District Munsif recorded further evidence and reported to the District Court that no nuisance would be created. This finding was accepted by the District Judge, who thereupon allowed the appeal.

The appellant contends that the District Judge has misread S. 61 and that on a proper construction of it and other relevant sections of the Act the decision of the District Munsif was correct. S. 61 (1) reads as follows:

"All public streets in any municipality, with the pavements, stones and other materials thereof, and all works, materials and other things provided for such streets, all sewers, drains, drainage works, tunnels and culverts, whether made at the cost of the Municipal fund or otherwise, in, alongside or under any street, whether public or private, and all works, materials and things appertaining thereto shall vest in the Municipal Council"

Therefore all drains which are alongside a public street vest in the Municipal authority. But this must mean that a drain which is alongside a public street is a drain which is there for the purpose of draining the street. It could never have been the intention of the Legislature to vest in the Municipal Council a drain on private property which has nothing to do with the drainage of the street. If a drain on private property, constructed merely for the purpose of draining the private property, were to vest in the Municipal Council by reason of S. 61 (1) it would mean the confiscation of private property without compensation. Where private property is taken away from the owner there must be words used in the enactment which clearly express the intention of the Legislature to give the power. The wording used in S. 61 (1) is certainly not appropriate for this purpose.

The definition of "public street" is to be found in S. 3 (21). The expression "public street" means a street, road, square,

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court, alley, passage, or riding path, over which the public have a right of way whether a thoroughfare or not, and includes (*a*) the roadway over a public bridge or causeway; (*b*) the footway attached to a street, public bridge or causeway; and (*c*) the drains attached to a street, public bridge, or causeway and the land, whether covered or not by any pavement, verandah, or other structure which lies on either side of the roadway "up to the boundaries of the adjacent property whether that property is private property or property belonging to the Government". Therefore drains which are attached to a public street are included in the definition but the Legislature has been careful not to include land on either side of the roadway which lies beyond the boundary of private property.

Provisions regarding private drains are contained in Ss. 138 to 144. It is unnecessary to refer to them in detail. It is sufficient to say that S. 138 gives the municipality the control over house drains within or without the premises to which they belong for the purposes of alteration, repair, cleansing and maintenance in proper order and provides for the charging of the expenses incurred in such matters to the owner of the property. There is no provision in the Act for vesting private drains in a Municipal Council although the Council can insist on private drains being used by others when the provisions of S. 141 of the Act apply. That section states that when the executive authority is of opinion that a group or block of premises a part of which is situate within 100 feet of a municipal drain already existing, or about to be constructed, may be drained more economically or advantageously in combination than separately, the executive authority may, with the approval of the Council, cause the group or block of premises to be drained by the method which appears to the executive authority to be the best suited. But before any steps can be taken to carry out such scheme of drainage not less than 15 days' notice shall be given to the owners of the property, of the nature of the intended work, the estimated expenses and the proportion of the expenses payable by each owner. When such a scheme has been carried out the owners for the time being of the premises constituting a group or block are to be the owners of the drains and are responsible for the expense of maintaining the drains in good repair and efficient condition. The learned Advocate for the respondent has in the course of the argument referred to the

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section and has suggested that it has application here. The short answer is that the Municipal Council did not purport to act under this section and the notice required by the section was not given. It was never suggested in the Courts below that this section had any application and it is quite obvious that it has not.

S. 61 does not give the Municipal Council the right to connect or sanction the connection of the respondent's drainage system with that of the appellant. The appellant's drain is her own private property. While the Municipal Council has the right to insist that it shall be kept in proper repair and order it has no power to impose any burden upon the appellant unless it be in circumstances which come within the purview of S. 141. This case does not come within the purview of that section. There is support for the view expressed in this judgment in the observations of Sadasiva Aiyar and Burn, JJ., in *Arunachala Chettiar* v. *Municipal Council of Mayavaram*[1]. There the Court had to consider whether certain drains attached to a public street and intended to carry off water falling on the street vested in the Mayavaram Municipality under S. 24 of the Madras Act IV of 1884, even though the site of the drains belonged to private individuals. The Court held that the drains did vest and pointed out that S. 3 (*27*) (*c*) of the Madras City Municipal Act, 1904, made it clear that the drains should be attached to the street in order to vest them in the Municipality. S. 3 (*27*) (*c*) provided that the term "public street" should include drains attached to the street and the lands which lay on either side of the roadway up to the boundaries of the adjacent property, language similar to the language used in S. 3 (21) (*c*) of the Act which governs this appeal.

The learned Advocate for the respondent has drawn our attention to the decision of the Calcutta High Court in *Gunendra Mohan Ghosh* v. *Corporation of Calcutta*[2] and has suggested that the case is on all fours with the one now before us. The Calcutta case was decided on the provisions of the Calcutta Municipal Act of 1899 which differs in important respects from the Madras District Municipalities Act and the case lends no support for the respondent's argument.

1. (1919) 38 M.L.J. 222. 2. (1916) I.L.R. 44 Cal. 689.

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For the reasons indicated the decision of the District Judge must be held to be erroneous and the decision of the District Munsif restored. The appeal will consequently be allowed and the decree of the District Munsif's Court will stand. The appellant is entitled to her costs here and in both the Courts below.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

The Madura Kallalagar Devasthanam through its trustee, K. N. Radhakrishna Aiyar .. *Appellant* (Plaintiff)*

v.

N. Subbiah Ambalam .. *Respondent (Defendant).*

Madura Kallalagar Devasthanam v Subbiah Ambalam.

Landlord and tenant—Tenant taking water for second crop from landlord's tank—Liability to pay for it—Payment by tenant of water cess to Government—Effect.

Where a tenant takes water for the second crop from the estate tank the *solum* of which is vested in the landholder the tenant must pay for it. The fact that the Government water flowed into the landholder's tank did not mean that when the water got there it remained Government water. It mingled with the landlord's water and must be deemed to be his. The right of Government to levy water cess depends not upon the water belonging to the Government but upon its coming from a source belonging to the Government. Payment of water cess by tenant to Government does not affect the liability to pay for the water to the landholder.

Appeal against the decree of the District Court of Madura in A. S. No. 99 of 1937 preferred against the decree of the Court of the Deputy Collector of Melur Division of Madura in S. S. No. 385 of 1937.

P. N. Marthandam Pillai and *C. Rangaswamy Aiyangar* for Appellant.

K. Swaminatha Aiyar for Respondent.

The Court made the following

ORDER OF REFERENCE.†

Patanjali Sastri, J.—This second appeal raises the question whether the applicant as a landholder is entitled to levy any

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* S. A. No. 617 of 1938. 24th October, 1939.

†16th August, 1939.

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extra charge for water taken by the respondent, a ryot, for the cultivation of second crop on his holding which is a single crop wet land. It is common ground that it became possible to raise second crop on the land only because of the supply of Periyar water for which the ryot has paid water cess to the Government and that this Periyar water is stored in the appellant's tank before it is supplied to the respondent for irrigation purposes. It appears to be well settled that ordinarily if a ryot takes water from the village tank for cultivating a second crop for a holding which is registered as single crop wet land, the landholder is entitled to levy an extra charge—see *The Midnapore Zamindary Co., Ltd.* v. *Muthappudayan*[1] and *Venkata Rao* v. *Vaithilinga Udayan*[2] and the observations of Varadachariar, J., in *Venkataraju Garu* v. *Maharaja of Pithapuram*[3]. But the difficulty in this case arises owing to the water supply in the village tank being supplemented by Periyar water for which the respondent has to pay water cess to the Government. It is argued for the respondent that the water used for the cultivation of the second crop was really Government water and not the landholder's water and that therefore the basis of the appellant's claim fails. But I find it difficult to discover any principle underlying the argument that merely because the water, which is normally collected and stored in the landholder's tank and is supplied to the ryot therefrom by means of sluices controlled and regulated by the landholder, is supplemented from a Government source and the ryot is called upon on that account to pay water cess to the Government, the water that is supplied to the ryot for his second crop should be deemed to be Government water so as to disentitle the landholder from claiming an extra charge for such water. On no conceivable theory can the water in an estate tank the *solum* of which is vested in the landholder be said to belong to the Government and even under the wide and sweeping language of the Madras Irrigation Cess Act the right of the Government to levy water cess depends not upon the water belonging to the Government but upon its coming from a source belonging to the Government—see *Ayyanna* v. *Secretary of State for India*[4]. It seems to me therefore that on the principle of the series of decisions referred to above, the water flowing into the landholder's tank even from a Government source becomes landholder's water though the fact that such water comes into the tank and is paid for by the ryot may conceivably make a difference as to the quantum of the extra charge leviable by the landholder for the use of such water for a second crop.

1. (1920) 40 M.L.J. 213 : I.L.R. 44 Mad. 534.
2. (1901) 12 M.L.J. 22.
3. (1938) 1 M.L.J. 256 : I.L.R. (1938) Mad. 381 (F.B.).
4. (1933) 65 M.L.J. 179. I.L.R. 56 Mad. 696 at 699.

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The only decision which appears to have considered this question is *Sundaram Pillai* v. *Karuppayee Ammal*[1], but the learned Judges there have spoken with different voices and the consideration of the question was to a certain extent complicated by the contention there raised that such a claim for an extra charge would amount to an enhancement within the meaning of S. 30 of the Madras Estates Land Act. Venkatasubba Rao, J., seems to take the extreme view that even in an ordinary case where no Government water is brought into the tank, the landholder's right to rent must be determined with reference to the sections of the Estates Land Act and that unless he brings himself within the terms of S. 30, he has no right to levy an extra charge for water taken for second crop cultivation on single crop wet lands. It seems to me that this view cannot now be sustained in view of the Full Bench decision in *Venkataraju Garu* v. *Maharaja of Pithapuram*,[2] which clearly recognises the existence of the landlord's right to levy extra charge for unauthorised appropriation of water in the landholder's tank quite apart from the provisions of the Estates Land Act—see the observations of Varadachariar, J., at p. 266. Ramesam, J., the other learned Judge who took part in *Sundaram Pillai* v. *Karuppayee Ammal*[1], would seem to agree with the earlier cases of this Court holding that in the ordinary case, the landlord would be entitled to levy an extra charge for unauthorised user of the water for second crop cultivation and the claim to such a charge would not be an enhancement under S. 30 (at p. 15). But the learned Judge seems to be of the opinion that where, as in the present case, Government water has been brought into the tank and the ryot pays water cess to the Government, the landlord will have no right to levy an extra charge except by applying under S. 30 of the Estates Land Act to the Collector and showing that he has fulfilled the conditions laid down in that section (at p. 26). It is difficult however to see why the additional supply of water to the landholder's tank from a Government source and the consequent payment of water cess to the Government by the ryot should so radically affect not only the landlord's right to recover an extra charge for second crop but also the procedure for its recovery.

The question is by no means free from difficulty and having regard to its general importance to numerous landholders and ryots in the region covered by the Government Periyar Project, I think it desirable that there should be an authoritative ruling on the point. I refer this appeal therefore to a Bench and direct it to

1. (1935) 69 M.L.J. 48: I.L.R. 59 Mad. 5.
2. (1938) 1 M.L.J. 256: I.L.R. (1938) Mad. 381 (F.B.).

be placed before the Chief Justice for orders as to posting it before a Division Bench or a Full Bench as my Lord thinks fit.

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This appeal came on for hearing in pursuance of the Order of Reference.

P. N. Marthandam Pillai and *C. Rangaswami Ayyangar* for Appellants.

K. Swaminatha Iyer for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant is a landlord and supplies water to. his tenants from his own tank. The respondent is one of the tenants, and previous to *fasli* 1343 he took sufficient water from the tank for the cultivation of one crop on his holding. In *faslis* 1343 and 1344 and 1345 without his landlord's permission he took water for the raising of a second crop. As the result, the appellant filed a suit in the Court of the Deputy Collector, Melur, for the recovery of water rate on the basis of the two crops which the respondent had raised in each of the years mentioned. The Deputy Collector decreed the suit. An appeal then followed to the District Judge of Madura who reversed the Deputy Collector's decision in so far as it related to the additional charge claimed as the result of the tenant using water for the raising of second crops. Throughout it has been common ground that the water in the appellant's tank was augmented by water which Government allowed to flow into it from channels leading from the Periyar dam, which is a Government source. The respondent's case was that he had raised the second crop from water belonging to Government flowing from the appellant's tank. It may be taken that the raising of the second crop was only possible as the result of the increase in the water in the tank resulting from the supply which the tank received from the Periyar dam. The District Judge held that the landlord was not entitled to rent based on the second crop unless he could show that he had increased the capacity of the tank by deepening it or widening it or raising its bunds to receive Periyar water so that it might be available to the tenants to raise second crops. The landlord had not done this, but even if he had he could not, it was said, get anything extra unless he applied under S. 30 of the Madras Estates Land Act, 1908, for enhancement of rent. The District Judge also held that the water which the respondent had used

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for the raising of the second crops was not the landlord's water, but water belonging to Government. He expressed the opinion that the extent of the water passing through the landlord's tank could not confer on the landlord any special rights in the absence of proof that he had contributed something for the purpose of facilitating the supply. The appellant, having lost before the District Judge, filed the present appeal which in the first instance came before Patanjali Sastri, J., who considered that the question was one which should be decided by a Bench.

The decision of the District Judge is erroneous on both the points which I have mentioned. I will take the second point first. The fact that the Government water flowed into the appellant's tank did not mean that when that water got there it remained Government water. It mingled with the appellant's water and it must be regarded as being the appellant's water. I agree with the remarks of Patanjali Sastri, J., in his referring order that on no conceivable theory can the water in an estate tank, the *solum* of which is vested in the landholder, be said to belong to the Government and even under the wide and sweeping language of the Madras Irrigation Cess Act the right of the Government to levy water cess depends not upon the water belonging to the Government but upon its coming from a source belonging to the Government. The Government, if it had so desired, could no doubt have prevented its water flowing into the appellant's tank, but it allowed its water to get there and once it got there it passed out of its control and must in law be regarded as the property of the appellant.

When the District Judge delivered his judgment the decision of the Full Bench of this Court in *Venkataraju Garu* v. *Maharaja of Pithapuram*[1], had not been given and the legal position had therefore not then been clarified. In that case, as in this, extra water for a second crop had been taken by a tenant from a landholder's tank without the landholder's permission and the landholder filed a suit before the Deputy Collector for the recovery from the ryot of a sum of money for water taken without his permission. It was held that "rent" as defined in S. 3 (11) of the Act included money payable for water taken without permission and the suit was not a suit for enhancement of rent. The decision in *Venkataraju Garu* v. *Maharaja of Pithapuram*[1], clearly governs the present case and

1. (1938) 1 M.L.J. 256: I.L.R. (1938) Mad. 381 (F.B.).

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the appellant's contention that he is entitled to recover the amount claimed by him for the water taken from his tank for the raising of the second crops in the three years mentioned must be upheld.

The fact that under the Madras Irrigation Cess Act, 1865, the Government has power to levy from the respondent a water cess makes no difference. S. 1-A (4) provides that nothing in the section shall affect the rights and liabilities of the landholder and the ryot *inter se* under any contract express or implied, in regard to the payment of water cess. Therefore, the Act leaves the position of the landholder and the tenant *inter se* entirely unaffected. The respondent having taken water for the second crop from the appellant's own tank must pay for it.

The appeal will be allowed and the order of the Deputy Collector restored with costs here and in the lower appellate Court.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Kuttukken Eramullan Haji and others .. *Appellants* (Defendants 12, 13, 16, 17, 19, 20, 24, 27, 28 to 30, 32, 33 and Nil)*

v.

Pappinisseri Chandroth Narayanan and others .. *Respondents (Plaintiffs 2 and 1, Defendants 2, 14, 21, 23, 26, 31, 39, 42 and 44 and L. Rs. of 15th Defendant).*

Eramullan Haji v. Narayanan.

Malabar Compensation for Tenants' Improvements Act (I of 1900)—Contract between jenmi and kanomdar to pay compensation for improvements—Obligation how far binding upon sub-tenants—Sub-tenants taking holding without notice of covenant—Covenant whether annexed to land.

It cannot be said that a contract entered into between a jenmi and kanomdar under which the kanomdar was only to pay for improvements at specified rates is to be regarded as an obligation annexed to the ownership of the property. It cannot be placed any higher than a personal covenant, and being a personal covenant it cannot be enforced against sub-kanomdars. Moreover in a case where the sub-tenants were transferees for consideration

* S. A. No. 878 of 1935. 26th October, 1939.

Eramullan Haji *v.* Narayanan.

and when they had taken their holdings without notice of the obligation under which the kanomdar had placed himself, even if the obligation could be regarded as an obligation annexed to the land, it would still be unenforceable. It follows that the rights of the sub-tenants to compensation are the rights given by the statute.

Thethalan v. *Eralpad Rajah, Calicut,* (1916) 32 M.L.J. 442: I.L.R. 40 Mad. 1111 and *Ram Kinkar Banerjee* v. *Satyacharan Srimani,* (1939) 1 M.L.J. 544: L.R. 66 I.A. 50: I.L.R. (1939) 1 Cal. 283 (P.C.), relied on.

Appeal against the decree of the Court of the Subordinate Judge of Tellicherry in A. S. No. 138 of 1934 (A. S. No. 387 of 1933, District Court) preferred against the decree of the Court of the District Munsif of Taliparamba in O. S. No. 519 of 1929.

O.T.G. Nambiar and *A. Achuthan Nambiar* for Appellants.

K. Kuttikrishna Menon, C. Govindan and *T. K. Raman Nambisan* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The first and second respondents filed a suit in the Court of the District Munsif of Taliparamba for the redemption of a *kanom* on the payment of the *kanom* amount and the value of the improvements. The first respondent is the melcharthdar (lessee from the jenmi with power to redeem the *kanom*) and the second respondent is the jenmi who granted a *kanom* to the karnavan of the 11th respondent's tarwad on the 29th June, 1884. On 5th June, 1892, the kanomdar created a sub-kanom in favour of three persons who are not parties to the suit. In the original kanom deed, it was stipulated that the kanomdar should only be called upon to pay for improvements to the property at the rates stipulated therein. The sub-tenants of the sub-kanomdar were made parties to the suit and contended that they were entitled before ejectment to compensation on the basis of the provisions of the Malabar Compensation for Tenants' Improvements Act, 1900. The plaintiff-respondents maintained that the sub-tenants were only entitled to compensation at the lower rates mentioned in the kanom deed of 29th June, 1884. The District Munsif granted a decree for redemption on payment of the kanom amount, Rs. 2,500, and the value of the improvements calculated under the provisions of the Act. The plaintiff-respondents challenged the decision of the District Munsif that the Act applied in an appeal to the Subordinate Judge of Tellicherry. The Subordinate Judge allowed the

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appeal, holding that the deed and not the Act governed the position. His decision meant a reduction of Rs. 8,145-9-0 in the amount of compensation payable to the tenant defendants. Thirteen of them have filed this present second appeal.

The District Munsif held that the sub-tenant defendants had no notice of the terms of the kanom deed of the 29th June, 1884 and that when they entered into possession of their lands they believed *bona fide* that they would be paid the value of improvements under the Malabar Compensation for Tenants' Improvements Act when their sub-tenancies terminated. The Subordinate Judge did not question this finding of the District Munsif, but held that it should be presumed that all the sub-tenants had notice of the terms of the kanom deed. He also held that the stipulation that the jenmi should only pay compensation at the rates mentioned in the deed amounted to a covenant which ran with the land.

S. 19 of the Act provides that,

"Nothing in any contract made after the first day of January, 1886, shall take away or limit the right of a tenant to make improvements and to claim compensation for them in accordance with the provisions of this Act."

There was a stipulation in the sub-kanom deed of 5th June, 1892, that improvements should be paid for at the same rates as those mentioned in the earlier deed. But the sub-kanom deed falls within the mischief of S. 19 and unless the provisions of the earlier deed with regard to payment of compensation amounts to a covenant running with land of which the sub-tenants had notice, the decision of the Subordinate Judge must be set aside and the judgment of the District Munsif restored. S. 3 of the Act defines the word 'tenant' with its grammatical variations and cognate expressions, as including,

" A person who as lessee, sub-lessee, mortgagee or sub-mortgagee or in good faith believing himself to be lessee, sub-lessee, mortgagee or sub-mortgagee of land is in possession thereof. or who, with the *bona fide* intention of attorning and paying the customary rent to the person entitled to cultivate or let waste land, but without the permission of such person, brings such land under cultivation and is in occupation thereof as cultivator."

The sub-tenants, therefore, clearly come within the definition of "tenants". S. 5 says:

"(1) Every tenant shall on ejectment be entitled to compensation for improvements which have been made by him, his predecessor in interest, or by any person not in occupation at the time of the ejectment who derived title from either of them, and for which compensation has not already been paid; and every tenant to whom compensation is so due shall, notwithstanding determination of the tenancy or the payment or tender of the mortgage

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money (if any), be entitled to remain in possession until ejectment in execution of a decree or order of Court.

(2) A tenant so continuing in possession shall during such continuance hold as a tenant subject to the terms of his lease or of the mortgage, as the case may be."

A sub-tenant is a person who comes within the definition of "tenant" and consequently cannot be dispossessed of the land cultivated by him unless he has been paid the amount of the compensation allowed by the Act, if he is in possession under a contract later than 1st January, 1886.

Now, it is quite clear that there is in law no privity of contract or of estate between the sub-tenants and the jenmi: see *Thethalan* v. *Eralpad Rajah, Calicut*[1] and *Ram Kinkar Banerjee* v. *Satyacharan Srimani*[2]. In the former case of which the Privy Council approved in the latter case, Wallis C.J., said:

"The latter part of S. 108 shows that sub-leases and mortgages created by the lessee do not affect the rights of the lessor against the lessee, still less do they affect the rights of a lessee against his sub-lessee or mortgagee."

"There appears," he added,

"to be no sufficient reason for supposing that it was the intention of the Legislature by this section to bring the sub-lessee and the mortgagee from the lessee into direct relations with the lessor."

In *Ram Kinkar Banerjee* v. *Satyacharan Srimani*[2], the Judicial Committee held that a mortgage of a lease in any of the six forms of mortgage referred to in S. 58 of the Transfer of Property Act is not an absolute assignment under the Indian Law and does not create privity of estate between the lessor and the mortgagee. Therefore it is not open to the jenmi or the melcharthdar to claim that the appellants were privy to the contract of 29th June, 1884 or to the estate created thereby.

There is no reason to doubt the correctness of the finding of the District Munsif that the sub-tenants had no actual notice of the deed of 29th June, 1884, and the decision of the Subordinate Judge that they had constructive notice of it cannot be supported. Nor can support be given to his finding that the provision in the deed with regard to compensation amounts to a covenant running with the land. Mr. Kuttikrishna Menon has frankly and properly conceded that unless the provision in the deed can be regarded as falling within the provisions of S. 40 of the Transfer of Property Act his clients are out of Court.

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1. (1916) 32 M.L.J. 442: I.L.R. 40 Mad. 1111.
2. (1939) 1 M.L.J. 544: L.R. 66 I.A. 50: I.L.R. (1939) 1 Cal. 283 (P.C.).

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S. 40 states that where a third person is entitled to the benefit of an obligation arising out of contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon the obligation may be enforced against a transferee with notice, but not against a transferee for consideration and without notice of the obligation. The position then is this. The obligation must be annexed to the ownership of the property, but even then it cannot be enforced against a transferee for consideration without notice. In the present case it cannot be said that the contract entered into between the jenmi and the kanomdar under which the jenmi was only to pay for improvements at specified rates is to be regarded as an obligation annexed to the ownership of the property. It cannot be placed any higher than a personal covenant, and being a personal covenant it cannot be enforced against the appellants. Moreover, the sub-tenants are transferees for consideration and they took their holdings without notice of the obligation under which the kanomdars had placed themselves. Therefore, even if that obligation could be regarded as an obligation annexed to the land it would still be unenforceable. It follows that the rights of the sub-tenants to compensation are the rights given by the statute.

The second appeal must be allowed and the decree of the District Munsif restored, with costs in this Court and in the lower appellate Court. Six months will be the period fixed for redemption.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Delhi Bather .. *Petitioner* (Accused)*

v.

The Corporation of Madras by its Food Inspector C. P. Subramaniam .. *Respondent (Complainant).*

Delhi Bather v. Corporation of Madras.

Madras Prevention of Adulteration Act (III of 1918), S. 5 (1) (d) and proviso (ii)—Manufacturer responsible for defect in goods sold—Retail seller disposing of goods in sealed tins—Whether liable to be convicted.

The accused was convicted of an offence under S. 5 (1) (*d*) of the Madras Prevention of Adulteration Act of 1918 for offering for sale butter contain-

* Crl. R. C. No. 405 of 1938. (Crl. R. P. No. 386 of 1938). 8th November, 1938.

Delhi Bather *v.* Corporation of Madras.

ing more than twenty per cent. of water. It was shown that the butter was offered for sale in sealed tins in the state in which it was purchased from the Butter Company and the evidence of the Assistant Manager of the Butter Company was to the effect that the extra moisture must have got unavoidably admixed in the process of the manufacture of the butter.

Held, that the conviction of the accused was illegal as proviso (*ii*) to S. 5 of the Madras Prevention of Adulteration Act provides that no offence under that section shall be deemed to have been committed in such cases.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the order of the 2nd Presidency Magistrate of the Court of the Presidency Magistrates, George Town, Madras, dated 9th May, 1938 and made in M. No. 1046 of 1937.

V. Rajagopalachari and *K. Sanjiva Kamath* for Petitioner.

A. Suryanarayanayya for Respondent.

C. V. Nagaraja Sastri for *The Crown Prosecutor* for the Crown.

The Court made the following

ORDER.—The petitioner is the proprietor of an Oilman Stores in the Moore Market and he has been convicted under S. 5, cl. (1) (*d*) of the Madras Prevention of Adulteration Act of 1918 for offering for sale butter containing more than 20 per cent. of water. The butter was offered for sale in sealed tins in the state in which it was purchased by the petitioner from Lord's Butter Company and the evidence of the Assistant Manager of the Lord's Diary Farm shows that the extra moisture must have got unavoidably admixed in the process of the manufacture of the butter. Proviso (ii) to S. 5 provides that no offence under that section shall be deemed to have been committed in such cases and the conviction of the petitioner cannot be sustained. It is therefore set aside and the fine if levied will be refunded.

B. V. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Sundarammal .. *Petitioner** (*Petitioner*)
v.
Palaniandi Mudali .. *Respondent* (*Counter-Petitioner*).

Sundarammal *v.* Palaniandi Mudali.

Criminal Procedure Code (V of 1898), S. 488—Right to maintenance—Claim by wife—Reasonable apprehension of ill-treatment as ground.

A wife is not bound to return to her husband and live with him if really she has reasonable apprehension of physical ill-treatment. And though the fact that the husband has married a second wife is not a just ground for the first wife's refusal to live with him that is a factor to be taken into account in considering whether the offer by the husband to maintain her is really *bona fide* or not.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Ranipet dated 12th August, 1938, in M. C. No. 16 of 1938.

K. Chandrasekharan for *B. C. Seshachala Aiyar* for Petitioner.

K. Venkataraghavachariar for *The Public Prosecutor* for the Crown.

V. Rajagopalachariar for Respondent.

The Court made the following

ORDER.—This is a petition arising out of an application for maintenance by a wife against her husband. The marriage is admitted and the maintenance is sought not only for the petitioner herself but also for her child aged about two years. The unfortunate feature of this case is that while this child was in the womb, the petitioner had an attack of small-pox which left her more or less a physical wreck and made her completely blind with the result that she is absolutely helpless and unable to earn anything by her own exertions, and indeed she requires assistance even for ordinary purposes. The learned Magistrate appears to have ignored altogether the claim of the child whose right to get maintenance is not and cannot be denied, because it is not pretended that the counter-petitioner ever gave anything for the maintenance of the child or that the child was living with him. So far as the child is concerned, it is obvious that the order of the Magistrate dismissing the petition entirely cannot be sustained.

* Crl. R. C. No. 656 of 1938. (Crl. R. P. No. 624 of 1938). 14th December, 1938.

Sundarammal v. Palaniandi Mudali.

As regards the petitioner herself, she did give as a reason for her refusal to accept the belated offer of the counter-petitioner to take her back that she was afraid of further ill-treatment. The learned Magistrate appears to have thought that this cannot be regarded as a valid ground for the refusal to accept the offer. He says, "To me this ground of her refusal appears as no valid ground." This is obviously wrong because the ground would be certainly sufficient ground or as the section has it 'just ground' for the refusal. A wife is not bound to return to her husband and live with him if really she has reasonable apprehension of physical ill-treatment. The learned Magistrate's final decision appears to have been vitiated by this wrong view of the law on the subject of what constitutes a just ground for a wife's refusal to live with her husband. No doubt in one place he says vaguely that he does not find any neglect on the part of the counter-petitioner, because the petitioner's mother begged for her daughter's welfare but that is not at all conclusive on the point. It may be that the actual begging was due either to actual want or to the belief in the efficacy of begging as a cure for the blindness. But there can be no doubt in this case that there was a neglect by the counter-petitioner to maintain the petitioner for sometime past. The counter-petitioner has married a second wife; and though this is not a just ground for the first wife's refusal to live with him, that is a factor to be taken into account in considering whether the offer is really *bona fide* or not. On the whole, it seems to me as if the petitioner had established satisfactorily her claim to maintenance for herself and as regards the claim on behalf of the child, there is really no defence to it.

In the circumstances, therefore, the order of the Magistrate dismissing the petition is set aside. I am of opinion that a maintenance of Rs. 6 a month to the petitioner and Rs. 2 a month for her child would be reasonable maintenance and there will be an order directing the counter-petitioner, the respondent in this Court, to pay maintenance allowance at these rates to the petitioner with effect from the date of the order of the Sub-Divisional Magistrate, that is, 12th August, 1938.

B. V. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Mahadevi *alias* Kunhi Thampuratti styled Manaviyathen, the present Valiya Thampuratti of Ambati Kovilakam .. *Petitioner** (*2nd Defendant*)

v.

P. P. Sankara Menon .. *Respondent* (*Plaintiff*).

Mahadevi *v.* Sankara Menon.

Provincial Small Cause Courts Act (IX of 1887), Art. 31 of Sch. II—Suit by agent for recovery of balance due from principal—If suit for accounts—Jurisdiction of Small Cause Courts.

The agent of a *stanam* sued his principal for a balance of Rs. 189-9-9 as due to him. His case was that after taking into account what he had collected by way of rent and what he had expended and the salary due to him the defendant was liable for the amount. Defendant objected to the jurisdiction of the Small Cause Court on the ground that it was a suit for an account within the meaning of Art. 31 of the second schedule of the Provincial Small Cause Courts Act, 1887.

Held, it was not a suit for an account and the District Munsif had jurisdiction.

Nature of suit for accounts explained.

Konduru Runga Reddi v. *Subbiah Setty and Kumbahala Subbamma* (1904) I.L.R. 28 Mad. 394; *Varadarajulu Chettiar* v. *Pattra Narayanaswami Chetti*, (1913) 24 M L J. 603 and *Ramachandra Madhavadoss Co.* v. *Moidunkutti Birankutti & Bros.*, (1938) 2 M.L.J. 112, relied on.

Abdul Rahiman Rowther v. *Jamalluddin Sahib & Co.*, (1938) 2 M.L.J. 76, disapproved.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Calicut in S. C. S. No. 1666 of 1935.

P. Govinda Menon for Petitioner.

D. A. Krishna Variar for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The question involved in this petition is whether the District Munsif of Calicut exercising small cause jurisdiction was right in entertaining the suit filed by the respondent against the petitioner. The respondent was the agent of a *stanam* and it was his duty as such to collect the rents due to the *stanam* and to meet all proper expenses in connection with the estate. He was appointed as the agent on the 17th September,

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* C.R. P. No. 1292 of 1936. 11th October, 1939.

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1931. For reasons which have not been disclosed, and in any event would not be material, he was suspended from his duties on the 21st August, 1932. His suspension was followed by his dismissal on the 17th December, 1932. The respondent filed the suit out of which this petition arises to recover from the petitioner a sum of Rs. 189-9-9. His case was that after taking into account what he had collected by way of rent and what he had expended, and the salary due to him during his period of suspension together with the peon's salary which he had himself met, the petitioner was liable in the sum mentioned. The petitioner objected to the jurisdiction of the Court on the ground that this was a suit for an account within the meaning of Art. 31 of the second schedule to the Provincial Small Cause Courts Act, 1887. Art. 31 excludes from small cause jurisdiction a suit for an account. The District Munsif held that this was not a suit for an account within the meaning of Art. 31 and passed a decree for Rs. 106-5-0 with interest and costs.

It is manifest that the District Munsif was right in holding that he had jurisdiction to try the suit. As was pointed out by a Bench of this Court in *Konduru Runga Reddi* v. *Subbiah Setty and Kumbahala Subbamma*[1], a suit for an account is a special form of suit. It does not embrace every case in which accounts have to be looked into to ascertain the amount due to the plaintiff. A special process is required to take an account and Small Cause Courts have no means of dealing with such an action. I may add that suit for an account implies that the plaintiff is entitled under the substantive law to demand an account from the defendant. If he establishes the right the defendant is called upon to submit an account and if he fails to comply he does so at his own risk. If the account is submitted the plaintiff may file objections. When the preliminaries are completed the account is taken by the Court, usually through an officer appointed for the purpose.

A similar decision to that in *Konduru Runga Reddi* v. *Subbiah Setty and Kumbahala Subbamma*[1] was given by another Bench of this Court in *Varadarajulu Chettiar* v. *Pattra Narayanaswami Chetti*[2]. *Konduru Runga Reddi* v. *Subbiah Setti and Kumbahala Subbamma*[1], was followed by Abdur Rahman, J., in *Ramachandra Madhavadoss Co.* v. *Moidunkutti*

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1. (1904) I.L.R. 28 Mad. 394. 2. (1913) 24 M.L.J. 693.

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Birankutti & Bros[1]. A dissentient note was, however, sounded by Venkatasubba Rao, J., in *Abdul Rahiman Rowther* v. *Jamalluddin Sahib & Co.*[2]. The learned Judge considered that the substance of the suit had to be looked into and if it involved the taking of an account it was a suit for an account within the meaning of Art. 31. The learned Judge referred to the decision in *Konduru Runga Reddi* v. *Subbiah Setty and Kumbahala Subbamma*[3], by which he was bound but he did not follow it. The opinion which Venkatasubba Rro, J., expressed is not only contrary to the authorities which were binding on him, but is clearly one which cannot be supported.

In the present case the respondent was in effect suing for an indemnity against his principal. S. 222 of the Indian Contract Act says that the employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him. An employer can call upon his agent for an account, but an agent cannot call upon his employer for an account.

The decision of the District Munsif that he had jurisdiction to entertain the suit was right. The petition therefore fails and must be dismissed with costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Pichakkari *alias* Pukkutty Janaki (dead) and others .. *Petitioners** (*Defendants*)

v.

Sivagnana Nachiar ... *Respondent* (*Plaintiff*).

Pichakkari v. Sivagnana Nachiar.

Madras Land Revenue Assessment Act (I of 1908)—Suit for contribution for peishkush *paid after the portion of estate has passed into other hands—Suit if lies in Civil Court—Provincial Small Cause Courts Act, Sch. II, Art. 41—If bar to suit.*

Though the Act deprives the parties from recourse to Civil Courts with regard to the amount fixed for *peishcush* there is nothing in this Act or Rent Recovery Act which prevents a party coming to a Civil Court for contribution for *peishkush* paid after a portion of the estate has passed into other hands. Sch. II, Art. 41 of the Small Cause Courts Act is no bar to the suit either.

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1. (1938) 2 M.L.J. 112. 2. (1938) 2 M.L.J. 76.
3. (1904) I.L.R. 28 Mad. 394.

* C. R. P. No. 1570 of 1936. 17th October, 1939.

Pichakkari v. Sivagnana Nachiar.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Tinnevelly in S. C. S. No. 224 of 1935.

K. Rajah Aiyar and *S. Rajagopalachari* for Petitioners.

K. S. Ramachandra Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The defendants obtained a portion of the estate registered in the name of the plaintiff; and the plaintiff and the defendants put in a joint application to the Collector (Ex. A) for an apportionment of the peishkush payable on the two portions of the estate. According to that agreement they prayed the Collector to fix the amount payable by the defendants at Rs. 145. The Collector separately registered the portion of the estate belonging to the defendants, but at the time of filing the suit he had not apportioned the assessment. In order to fix the assessment some inquiry is necessary, and although the plaintiff contended that the Collector had apportioned the assessment, the lower Court held that there was no evidence to that effect. The plaintiff brought this suit on Ex. A praying for contribution of peishkush from the defendants. He was obliged to bring this suit now because otherwise the suit for the suit faslis would have been barred by limitation.

In revision it is argued that under the Madras Land Revenue Assessment Act no suit lies in the Civil Court. The petitioners also contend that the suit is not of a small cause nature and, finally, that the lower Court did not fix the proper rate. S. 4 of the Madras Land Revenue Assessment Act makes it clear that, until the assessment has been apportioned, the Government look only to the old registered holder for the peishkush and after the apportionment Government look partly to the old registered holder and partly to the new registered holder for the shares of the peishkush apportioned to them. This Act deprives the parties from recourse to a Civil Court with regard to the amount fixed for peishkush; but there is nothing in this Act or in the Rent Recovery Act which prevents a party from coming to a Civil Court for contribution for peishkush paid after a portion of the estate has passed in to other hands.

Various sections of the Small Cause Courts Act have been referred to, but the one that is now relied on in this petition as

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barring a decision by a Small Cause Court is Art. 41. Art. 41 prohibits suits for contribution by a sharer in joint property; but this is not a suit for contribution by a sharer in joint property. The properties of the parties are separate; but because apportionment has not been made, the owner of one separated portion of land was obliged to pay the whole of the peishkush. The suit was therefore properly filed in the Small Cause Court.

With regard to the amount fixed, even though Ex. A was not an agreement, the Court rightly placed great reliance on a figure that had been agreed upon by the holders of the two parts of the estate; and I find no reason to think that the decision of the lower Court on the facts is incorrect.

Nothing that the Court has decided in this suit will, of course, preclude the Collector from fixing what he considers to be the proper amount of peishkush payable by the plaintiff and by the defendants respectively. If the parties have any grievance with regard to the rates fixed by the Collector, their remedy is by way of an appeal to the Board of Revenue.

This revision petition is dismissed with costs.

A memorandum of cross-objections has been filed, contending that there was material before the Court or, at any rate, there could have been material before the lower Court, sufficient to prove that the Collector had passed an order apportioning the peishkush. It is not necessary to consider this memo. of cross-objections and it is dismissed without costs.

Petition and memo. of cross-objections dismissed.

K.S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Dasari Ammanna .. *Appellant** *(Plaintiff)*

v.

Mirtivada Raja Reddi and others .. *Respondents* *(Defendants).*

Ammanna v. Raja Reddi.

Agency Tracts Interest and Land Transfers Act (I of 1917), S. 5—Scope—Member of hill tribe acquiring property in plains—Suit on mortgage executed by such person—Court having territorial jurisdiction—Power to entertain suit—Personal remedy to be agitated in Agency Courts.

S. 5 of the Agency Tracts Interest and Land Transfers Act of 1917 indicates an intention that the personal liabilities of members of hill tribes resident within the Agency shall be decided only by the Agency Courts, but

* A. A. O. No. 216 of 1936. 3rd August, 1939.

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there is no clear indication that the section is intended to abrogate the ordinary powers of a Civil Court to deal with suits relating to immovable property situated within its jurisdiction merely because one party is a member of a hill tribe. Where a suit on a mortgage was filed in the District Court of East Godavari and it appeared that the mortgaged properties were situate within the jurisdiction of that Court but objection was raised to the Court's jurisdiction on the ground that the defendants were members of a hill tribe and that the Court's jurisdiction was ousted by reason of S. 5 of the Agency Tracts Interest and Land Transfers Act, 1917.

Held, that the Court of the District Judge of East Godavari was competent to entertain the suit so far as it was a suit relating to immovable property, though the personal remedy against the mortgagors could be pursued only in the Courts of the Agency.

Appeal against the order of the District Court of East Godavari at Rajahmundry dated 6th December, 1935 and made in O. S. No. 5 of 1934.

P. Somasundaram for Appellant.

P. V. Vallabhacharyulu and *C. Rangaswami Aiyangar* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit on a mortgage of property situated within the East Godavari District. It is conceded that none of the property covered by the mortgage is situated within the Agency tracts. A preliminary objection was taken to the jurisdiction of the learned District Judge with reference to the terms of S. 5 of the Agency Tracts Interest and Land Transfers Act (I of 1917) which runs as follows:

"Notwithstanding the provisions of any law to the contrary, every suit against a member of a hill tribe instituted after the commencement of this Act shall be instituted in the Courts of the Agency tracts."

It is conceded that the defendants are members of a notified hill tribe and ordinarily resident in the Agency, so that they come within the definition of "hill tribe" in the Act. Reading S. 5 in its literal sense it would therefore appear that Courts other than the Agency Courts have no jurisdiction to deal with any suit against them whatever is the subject-matter of the suit and wherever it be situate. I am constrained to hold that this interpretation of the Act cannot be correct interpretation. In the first place, it results in the anomalous position that when a member of a hill tribe acquires land in the plains, no Court would have jurisdiction to entertain any suit relating to that land, for clearly the Agency Courts cannot by virtue of this Act be deemed to have acquired a local jurisdiction over properties situate outside the limits of the local jurisdiction of

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those Courts and inside the local jurisdiction of the ordinary Civil Courts. Ordinarily speaking, under S. 16, Civil Procedure Code, a suit relating to immovable property including a suit for foreclosure, sale or redemption of mortgaged property must be instituted in the Court within the local limits of whose jurisdiction the property is situate. The law relating to the Agency tracts has no application to suits relating to rights in property situated outside the Agency. If therefore the Civil Courts of the Godavari District have no jurisdiction to deal with suits relating to immovable property, including mortgaged property, within their local jurisdiction, belonging to a hill tribesman, then no Court can try those suits at all. That is an absurd position which cannot be deduced from a statute unless the statute is quite plainly capable of no other meaning. Now, this Act is described as an Act to regulate the rate of interest and the transfer of land in the Ganjam, Vizagapatam and Godavari Agency tracts which are quite clearly nothing more than the scheduled areas included within the districts of Ganjam, Vizagapatam and Godavari. S. 4 indicates an intention in the Act to control the transfer of immovable property situated within the Agency tracts by a member of a hill tribe. There is no indication of any intention to control the transfer of immovable property situated outside the Agency tracts, but owned by a member of a hill tribe. S. 5 clearly indicates an intention that the personal liabilities of members of hill tribes resident within the Agency shall be decided only by the Agency Courts, but there is no clear indication that this section is intended to abrogate the ordinary powers of a Civil Court to deal with suits relating to immovable property situated within its jurisdiction merely because one party is a member of a hill tribe. Having regard to the fact that the interpretation of S. 5 as taking away jurisdiction from the ordinary Civil Courts over immovable property with reference to which no jurisdiction exists in any other Court, would result in a denial of justice and the existence of a wrong without a remedy, I am of opinion that we must interpret S. 5 as intended to relate only to suits which are within the cognisance and jurisdiction of an Agency Court. Applying the section as so interpreted to the present case, it follows that the Court of the District Judge of East Godavari has jurisdiction to entertain the suit so far as it is a suit relating to immovable property, though the personal remedy against the mortgagors is one which may with refer-

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ence to the terms of S. 5 be pursued in the Courts of the Agency.

There is, however, another objection, namely, that the defendants come within the exception to the definition of "hill tribe" in that they are landholders as defined in the Madras Estates Land Act. The learned District Judge has rejected this plea on the ground that Ex. I, the instrument confirming their status as mittadars itself affords sufficient proof that the first defendant is not a landholder within the meaning of the Madras Estates Land Act. I have been through Ex. I and I am unable to find in that document the proof to which the learned District Judge refers. It is however desirable that evidence should be taken on this question. If as a result of that evidence the learned District Judge is of opinion that the first defendant is not a landholder, then the plaintiff must be referred to the Agency Court for his personal remedy against the first defendant and the District Judge will proceed only with the trial of the mortgage claim proper. If the finding regarding the position of the defendants as landholders is such as to exclude them from the provisions of the Act referred to, the learned District Judge can dispose of the whole of the suit.

The appellant will be entitled to his costs in this appeal including the costs of the Court-guardian. Costs in the lower Court to be provided for in the decree of that Court.

B.V.V. — *Case remanded.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Nagpur.]

PRESENT:—LORD THANKERTON, SIR GEORGE RANKIN AND MR. M. R. JAYAKAR.

The Commissioner of Income-tax, Central and United Provinces, Lucknow .. *Appellant**

v.

Messrs. Motiram Nandram .. *Respondents.*

P.C.

Commissioner of Income-tax, C.P. & U.P., Lucknow *v.* Motiram Nandram.

Indian Income-tax Act (XI of 1922), S. 10 (2) (ix)—Deductions—Firm of moneylenders and cotton dealers—Deposit paid to oil company to secure agency for sales of oil products—Deposit lost through insolvency of oil company—Whether loss deductible in calculating profits of firm's business as moneylenders and cotton dealers—Whether trading or capital loss.

By S. 10 (2) (*ix*) of the Indian Income-tax Act, 1922, in assessing the profits or gains of a business for purposes of tax, allowance may be made

* P. C. Appeal No. 32 of 1939. 14th November, 1939.

P.C.

Commissioner of Income-tax, C.P. & U.P., Lucknow v. Motiram Nandram.

for "any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains".

A firm of moneylenders and cotton and yarn dealers entered into an agreement with an oil company whereby they were to become agents for the sale in a certain territory of that company's spirits and fuel oils. The agreement provided *inter alia* for the deposit by the firm with the oil company of Rs. 50,000 in consideration of their appointment as the company's organising agents. The firm were to find suitable agents for the company and to retain to the extent of the Rs. 50,000 deposited by them, deposits made by those agents. The firm were to guarantee all purchases by agents from the company in excess of the agents' deposits, and to countersign all the agents' orders for goods. The firm were to receive commissions at specific rates, and to pay from those commissions the commissions due to agents. The firm might canvass for orders for spirit and oil, but might only effect sales through the selling agents. The firm having paid the deposit of Rs. 50,000, the oil company became insolvent at a time when the firm had only recovered Rs. 10,500 by way of deposits from agents. On a claim by the firm to deduct that loss of Rs. 39,500 in computing the profits of their business for the material year of assessment.

Held, that as (1) the firm were, by their agreement with the oil company, entering into a business different in character from that of moneylenders and dealers in cotton and the loss in question had been incurred in relation to that business with the oil company; and as (2) the deposit was, although in one sense a loan to the company, yet not a loan in the ordinary course of the firm's moneylending business but a sum paid for the purpose of securing benefit of an enduring nature, the losses in question could not be deducted in assessing the profits of the firm's ordinary business.

Decision of the High Court reversed.

Appeal from a decision of the High Court, Nagpur, on a reference under S. 66 (2) of the Indian Income-tax Act, 1922.

The respondents were three brothers carrying on business in the Central Provinces, their business before 1930 being that of dealers in cloth and yarn and of moneylenders. By a written agreement dated the 17th December, 1930, they agreed to become organising agents to a Bombay firm called the White Kerosene and Mineral Oil Co., dealers in motor spirit and fuel oils. The agreement provided as follows: The respondents deposited with the Kerosene Company in consideration of being appointed their agents in a defined territory, various sums totalling Rs. 50,000, and undertook to find suitable selling agents for the company to appoint. Those agants were to make deposits with the company, the deposits being received by the respondents and retained by them to the extent of the Rs. 50,000 which they had themselves deposited. The respondents were to guarantee payment by each agent to the company of so much of the price of indented goods as was not covered by his deposit, and to countersign all indents for goods. Provision was made for payment to the respondents of commission out of which they were to pay commission to the selling agents. They

P.C.

Commissioner of Income-tax, C.P. & U.P., Lucknow *v.* Motiram Nandram.

were permitted to canvass for orders for fuel oil but not to effect sales, except through selling agents. The company were to provide the respondents with certain staff and office accommodation. The respondents having duly deposited the Rs. 50,000 the company in 1931 became insolvent when the respondents had only recovered Rs. 10,500 in deposits from selling agents. The respondents obtained a judgment against the company for the sum due to them, with interest, but recovered nothing under it. They were accordingly left with a loss of Rs. 39,500 which they claimed to deduct from the profits of their business for the year 1932-33. The income-tax officer having refused to allow the deduction on the ground that the bad debt was a capital loss, and the Assistant Commissioner having taken the same view, the appellant commissioner stated a case under S. 66 (2) of the Indian Income-tax Act for the permission of the Court expressing his own opinion in the Crown's favour. The High Court allowed the deduction, and the Crown now appealed.

J. Millard Tucker, K. C. and *Hubert Hull* for Appellant.—It is to be observed; first, that the respondents' claim to deduct their loss of Rs. 39,500 from the profits of *their business*. The question therefore arises whether the sum is a loss incurred in their business. Their business is that of dealers in cloth and yarn and of money-lenders, and it is submitted that the agreement with the kerosene company under which the Rs. 50,000 was paid to them established an arrangement which was not part of the respondents' ordinary business at all, and that the loss of that sum is accordingly a capital loss, which they cannot claim to deduct, and not in the nature of a trading loss. The Rs. 50,000 was in the nature of a capital investment. It was paid only for the purpose of their obtaining the appointment as organising agents to the kerosene company. They were in fact embarking on a new agency business, the loss which they have incurred is a loss in that business. They cannot claim to deduct it from the profits of quite a different business.

The respondents did not appear and were not represented.

Cur. adv. vult.

14th November, 1939. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—In this case the respondents have not been represented before their Lordships.

The appeal is brought by the Commissioner of Income-tax, Central and United Provinces, Lucknow, from a decision of the High Court at Nagpur given upon a reference made to that Court under S. 66 (2) of the Indian Income-tax Act, 1922.

The question of law is as to the admissibility of a deduction of Rs. 39,500 in computing the profits of the assessees' business. The year of assessment in respect of which the question arises is the year 1933-4, and as it is not contested that the sum in question was expended or lost in the "previous year," 1932-3, the deduction, if permissible, is claimed for the proper year.

By the terms of S. 10 of the Act the profits or gains of a business are to be computed after making certain allowances, one of which is provided for by the terms of clause (ix) of sub-S. 2 as follows:—

(*ix*) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains.

The assessees are a Hindu undivided family consisting of three brothers who carry on business under the style of Motiram Nandram at Hinganghat in the district of Wardha in the Central Provinces with a branch at Balaghat. Until 1930 their business or businesses consisted in dealing in cloth and in yarn and as moneylenders. But by an agreement in writing dated 17th December, 1930, they agreed to become organising agents to a Bombay firm which under the name of the White Kerosene and Mineral Oil Company imported and dealt in kerosene motor spirit and fuel oils. The terms of this agreement are of importance for the decision of this appeal but it will be sufficient to state their effect so far as is necessary to exhibit the course of dealing to which it looked forward.

The agreement refers to the Bombay firm as "the company" and to the assessees as "the organising agents." It recites that the assessees were carrying on business as cloth merchants; that they had requested the company to appoint them organising agents in a defined territory known as Eastern Central Provinces; and that they had offered to deposit with the company Rs. 50,000. The company by the agreement appointed the assessees to be organising agents for five years in respect of the territory specified. Cl. 4 recited that in consideration of such appointment the assessees had on 8th and 12th December, 1930, deposited Rs. 3,000 and Rs. 22,000—in all Rs. 25,000. It provided that on or before 17th January, 1931, they should deposit a further Rs. 25,000, and continued: "The said sum of Rs. 50,000 shall remain at the disposal of the company for the purposes of the company's business and shall

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carry interest at the rate of 7 per cent. per annum until the deposit is returned by the company to the organising agents out of the selling agents' deposits as hereinafter provided."

The assessees undertook the duty of finding suitable selling agents for the company's goods in the territory in question. These agents were to be recommended by the assessees but were to be appointed by the company, and were to enter into agreements with the company under which they should make deposits with the company which the latter could use for the purposes of its business. The deposits were to be received on behalf of the company by the assessees, who were authorised to retain and appropriate them to the extent of Rs. 50,000 towards the return of their own deposit with the company. In respect of all contracts made by the company with the selling agents, the assessees guaranteed to the company the due payment of the price of such part of the indented goods as was not covered by the security deposits of the selling agents. If the assessees could not find selling agents who were willing to make deposits they were to recommend persons for appointment by the company as selling agents on a salary to be paid by the company. But the assessees were to be responsible to the company for the fulfilment of all obligations to the company of all selling agents and were to countersign all indents by selling agents for goods.

The assessees' commission was to be at the following rates:—a guarantee commission of 1 per cent. on all goods sold in the territory through selling agents; and a commission of four annas on every eight Imperial gallons of kerosene, and of two annas six pies on every gallon of motor spirit. Out of this commission the assessees were to pay commission to the selling agents.

The assessees were also to get a certain commission on fuel oil sold in the territory by the company; and were to be at liberty to canvass for orders for fuel oil, but not to effect sales, save through selling agents, without special permission of the company. Appropriate terms of commission were specified for such business. The commission account was to be made out every three months and the assessees were to be paid their commission within a fortnight of the adjustment of the account. The company was to provide the assessees with certain staff and office accommodation and to make certain allowances for

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the remuneration of a representative of the assessees at Hinganghat.

The assessees duly completed the deposit of Rs. 50,000 as provided for by clause 4 of the agreement, but the scheme was short-lived as the company in 1931 became insolvent before the assessees had recovered more than Rs. 10,500 from deposits made by selling agents. The sum of Rs. 39,500 was outstanding and repayable by the company, but though the assessees on 14th October, 1931, and 23rd November, 1931, recovered judgment for that sum together with certain interest (amounting in all to Rs. 42,272) in the High Court at Bombay nothing was in fact realised in satisfaction thereof.

The assessees claim to deduct the sum of Rs. 39,500 from the profits of their business or businesses in the year of account (1932-3), and this if permitted would convert their "total income" finally assessed by the Assistant Commissioner at Rs. 19,189 into a loss of over Rs. 20,000. The Income-tax officer refused to allow the deduction on the ground that the bad debt was a capital loss. The Assistant Commissioner took the same view, holding that "the deposit was neither a loan nor an advance towards the cost of goods nor did it represent money laid out for business, but that it was merely a security deposit, the object of which was to finance the company and to secure and acquire a new business or a new source of income." The Commissioner agreed in this opinion and stated the facts of the case for the opinion of the Court, framing the question of law as follows:—

Having regard to the terms of the agreement (Exhibit A) and the other circumstances of the case, was the Assistant Commissioner justified in holding that the item of Rs. 39,500 was not a trading loss but a loss of capital?

The reference was first heard by two learned judges of the Court of the Judicial Commissioner, Central Provinces, who gave judgment on 30th September, 1935, Subhedar, A.J.C., being in favour of the assessees and Pollock, A.J.C., being against them. On 6th November, 1936, after the High Court of Judicature at Nagpur had been established, Gruer, J., as third judge agreed with Subhedar, A.J.C. The judgment appealed from is thus a judgment answering the question referred in the negative by a majority of two judges to one.

The view taken by Subhedar, A.J.C., was that the deposit was made by the assessees in the course of their moneylending business, and Gruer, J., also concluded "that the transaction

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should be looked upon as a variation or extension of the assessees' moneylending business." Pollock, A.J.C., on the other hand considered that "the deposit was money invested in acquiring a new business and that it was not a loan made in the course of the assessees' money lending business, nor money laid out in the ordinary course of an existing business."

Their Lordships are of opinion that the character of the expenditure which the assessees now seek to bring within clause (ix) of section 10 (2) must be determined with reference to the business of organising agents in which the assessees engaged upon the terms of the agreement of 17th December, 1930. This business was of a different nature from that of moneylender, and the principle that money is the stock in trade or circulating capital of a moneylender cannot of itself determine the question which arises in this case. Subhedar, A.J.C., considered that "the assessees had nothing to do with the oil business in which the company and the selling agents were alone interested" and Gruer, J., makes a similar observation: "Paragraph 13 provides that the organising agents are not to effect any sales of the company's goods themselves. Their duties were to organise the network of selling agents to be guaranteed by them but appointed by the company. Thus they were not actually carrying on the company's business itself." But apart from the fact that the assessees under the agreement were to be at liberty to canvass for orders and, with special permission, to effect sales, the question is not whether the assessees were engaging in the business of merchants in oil. They were entering upon the business of organising agents for a firm of importers—a business different in character from that of moneylender. They had undertaken to find suitable persons to be appointed as selling agents, and to guarantee the fulfilment of all obligations incurred towards the company by such selling agents, some of whom might be working on a salary basis without having given security. The nature of the deposit of Rs. 50,000 must be considered in relation to this business.

Both of the learned judges who found in favour of the assessees appear to have considered that the course of business indicated in the agreement of 17th December, 1930, bore analogy to the case of a proprietor of an estate borrowing money and appointing the lender to be manager of the estate.

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But this, in their Lordships' judgment, is to rewrite the agreement. The assessees might have recouped themselves out of deposits made by selling agents at any time, but though the interest at 7 per cent. would have ceased to be payable the agency would still have gone on till the end of five years, and the assessees' work and commission as well as their liabilities under their guarantee might meanwhile have been heavy. It is impossible to regard the provision for a deposit as unconnected with the fact that the assessees were guaranteeing the selling agents' obligations. The deposits of the selling agents and of the organising agents were alike deposits by way of security according to the scheme of the agreement, though its language —save for the use of the word "deposit"—is not express upon the point in the case of the organising agents.

When the deposit is considered in relation to the organising agency, the special terms of the agreement of 17th December, 1930, are important since various suggestions have been made as to the true character of the deposit. One suggestion is that the deposit should be looked upon as the purchase price of goods paid to the company in advance and thus a mere trading expense; but this cannot be accepted. It would be a highly inaccurate statement of the effect of the agreement. The Rs. 50,000 was doubtless laid out with a view to earning profits in the business of organising agents in addition to the interest of 7 per cent., but it was not so laid out with reference to any particular transaction carried out in the course of such business. It was in one aspect a loan made to the company, but it was not a loan made in the course of carrying on the business of organising agents or in the course of the business of a moneylender. It was not a recurring expenditure. On the other hand, it was contemplated that in whole or in part the deposit should be returned to the assessees by the receipt of deposits from selling agents; so that if the Rs. 50,000 does fall to be regarded as invested in a business of organising agents, it was invested with a prospect that it might be a temporary investment and not a permanent one—in other words that the capital might later be withdrawn from the business. The question in such a case as the present must be "what is the object of the expenditure?" and it must be answered from the standpoint of the assessees at the time they made it—that is, when they were embarking upon the business of

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organising agents for the company. The deposit was clearly exacted by the company as a condition of the assessees being given an agency which they hoped to manage profitably. Their Lordships think that the purpose of being permitted to engage in such a business must be considered to be a purpose of securing an enduring benefit of a capital nature, and that the deposit cannot, upon a true view of the terms of the agreement and the circumstances of the case, be regarded as an expenditure made in the course of carrying on an existing agency, or any other business. They think that the view taken by the Income-tax authorities is correct, that this appeal should be allowed and that the question referred to the Court by the letter of reference dated 1st March, 1935, should be answered in the affirmative. They will humbly advise His Majesty accordingly. The assessees must pay the costs of the reference in the Judicial Commissioners' Court and High Court: also the costs of this appeal.

Solicitors for Appellant: *The Solicitor, India Office.*

R. C. C.

K. S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE NEWSAM.

Vasantharao Ammannamma .. *Appellant** (*Plaintiff*)

v.

Vijiapurapu Venkata Kodanda Rao Panthulu and others .. *Respondents* (*Defendants*).

Vasantharao Ammannamma *v.* Venkata Kodanda Rao Panthulu.

Will—Construction—Hindu testator—Bequest of estate to grandsons through daughter — Conferment of life-estate on daughter—Gift over to grandsons—Intentions of testator—Mode of ascertaining.

A Hindu testator who was a retired Subordinate Judge provided by his will as follows: "Out of the aforestated ancestral lands, the one-ninth share to which I am entitled shall be enjoyed after my death by my wife till her death, and after her death it shall pass to *S* son of my second elder brother deceased. My self-acquired properties shall on my death be enjoyed by my wife till her death and after her death, they shall pass to my daughter. Thereafter they shall pass to my grandsons through my daughter. As stated hereunder the debts due by me to outsiders should be discharged hereafter from the annual income derived from the said properties mentioned above. After discharging all the said debts the person who shall be enjoying the properties aforestated shall pay to my four grand-daughters each a sum of Rs. 25 per annum towards *pasupukunkuma.*"

* Appeal No. 120 of 1936. 1st May, 1939.

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Held, that as regards his self-acquired property the ultimate determination of the estate intended by the testator was to the grandsons, and the estate which the testator intended the daughter to take was an estate which she would take under the law of inheritance, that is a limited estate analogous to a widow's estate.

In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of a Hindu in respect of devolution of property. Thus a Hindu would ordinarily prefer, in the absence of a male issue, that his estate should go to his daughter's son in preference to his daughter's daughter both on account of natural love and affection and also on religious grounds.

Appeal against the decree of the Court of the Subordinate Judge of Vizagapatam dated 31st October, 1935, in O. S. No. 86 of 1934.

P. Somasundaram for Appellant.

Y. Suryanarayana for Respondents.

The judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.—The question for determination in this appeal is, what is the nature of the interest taken by the plaintiff and by her sons under the will of her father Maddirala Buchi Sundara Rao Pantulu Garu dated 26th July, 1899. It is the case of the plaintiff that she took an absolute estate in the properties bequeathed to her. It is the case of the first defendant that she took only a life interest and there was a vested remainder in favour of her sons defendants 2 and 3 and her deceased son Bayanna Pantulu whose sons are defendants 4 to 6. The seventh defendant is the son of the third defendant. The suit itself was filed for a declaration that the plaintiff got an absolute estate in the said properties and that the attachment effected by the first defendant of the interest of defendants 2 to 7 in the property in execution of a decree obtained by him in O.S. No. 36 of 1930 on the file of the Subordinate Judge's Court of Vizagapatam is invalid. The learned Subordinate Judge on a construction of the will held that the plaintiff did not take an absolute estate and dismissed the suit. It is this decision which is challenged in appeal by the plaintiff.

The main provisions of the will so far as they are material for the decision of this appeal run thus:—

"Out of the aforestated ancestral lands in Dimile and other villages, the one-ninth share of lands to which I am entitled, shall be enjoyed after my death by my wife till her death, and after her death it shall pass to Sundara Rao Pantulu Garu, son of my second elder brother Maddirala Kamaji Rao Pantulu Garu, deceased.

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"My self-acquired properties ...... the silver and gold and other movables belonging to me—all the properties aforesaid shall, on my death, be enjoyed by my wife till her death and after her death, they shall pass to my daughter. Thereafter, they shall pass to my grandsons through my daughter.

"As stated hereunder, the debts due by me to outsiders, should be discharged hereafter from the annual income derived from the said properties mentioned above. After discharging all the said debts, the person who shall be enjoying the said properties as aforestated shall pay to my four granddaughters each a sum of Rs. 25 per annum towards *pasupukunkuma*."

The contention of Mr. Somasundaram on behalf of the plaintiff is that the words of disposition in her favour, namely, "after her (wife's) death, they shall pass to my daughter" confer an absolute estate. It is now settled law that there is no presumption that a gift to a female means a limited gift or carries with it the effect of creating an estate exactly similar to a widow's estate under the law of inheritance. (*Vide* the dictum of Mitter, J., approved by the Privy Council in *Surajmani* v. *Rabi Nath Ojha*[1].) This presumption was given effect to in *Ramachandra Rao* v. *Ramachandra Rao*[2], where a gift by a husband to his wife simpliciter was held to confer an absolute estate. The words used in the will in that case were "my senior wife and junior wife shall each take a half." Seshagiri Aiyar, J., remarked in the course of the judgment thus:

"Unless there is an express or implified qualification to the contrary, the donor must be deemed to have conveyed all that he was possessed of in the property granted."

This decision, so far as I am aware, has been followed without question by our High Court. If the words used by the testator had stood by themselves, there is a good deal of force in the contention of Mr. Somasundaram. But they do not stand by themselves; closely following them occur the following words:—

"Thereafter (whether he used that expression to mean after the daughter's death or after the estate is taken by the daughter—whichever it is, is immaterial) through my daughter they shall pass to my grandsons."

Again, there are other provisions in the will which have also to be considered. Even in cases where the words used by the testator confer an absolute ownership, the circumstances or the context may be sufficient to show that such an absolute ownership was not intended. The question in all these cases therefore

1. (1907) 18 M.L.J. 7: L R. 15 I.A. 17: I.L.R. 30 All. 84 (P C.).
2. (1918) 36 M.L.J. 306: I.L,R. 42 Mad. 283.

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depends upon the intention of the testator which has to be gathered from the words used by him and the will read as a whole in the light of the surrounding circumstances at or about the date of the will.

In the light of the principles referred to above, let us see what the intention of the testator was in this case. He was a retired Subordinate Judge on the date of the will. There was ancestral property in which he had a share the division of which was not effected by metes and bounds and wherein not only his brothers but the descendants of his paternal uncles were also interested. The testator was himself a son of one of three brothers and his father had two sons besides the testator. On the date of the will the paternal uncles were dead, the two brothers of the testator were also dead and there was only a daughter by one of his brothers and a son by another brother by name Sundara Rao Panthulu. He himself had a wife and a daughter living and there were sons and daughters by the daughter. His object, as explained by him in the preamble to the will, was to make known how and by whom the property he was possessed of was to be enjoyed after his death without disputes in the family in future. So far as the ancestral property is concerned, he gave a life interest to his wife and after her death, he bequeathed it to the son of his brother the said Sundara Rao. Therefore, so far as that property is concerned, it was his intention to retain it in the family of his brothers. It is consistent with the ordinary notion of a Hindu that the ancestral property of the family should be retained in his family.

Coming to the self-acquired property, he directs that his wife should enjoy it during her lifetime. It is immaterial whether it is considered as a widow's estate or a life estate because the wife is dead. He then makes a provision in favour of his daughter to which I have already referred. The question in this case is, what estate did he intend his daughter to take? On a careful consideration of all the clauses in the will, we have come to the conclusion that the estate which the testator intended her daughter to take was an estate which she would take under the law of inheritance, that is, a limited estate analogous to that of a widow's estate. It is only then that the intention of the testator would best be effectuated and that every word in the will could be given effect to as it ought to be given effect to as

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far as possible. The testator had not stopped with the disposition in favour of his daughter but he directs that thereafter (which we think is after the lifetime of the daughter) the estate shall pass to his grandsons. It is clear that the ultimate destination of the estate intended by the testator was to the grandsons.

A good deal of argument was advanced on both sides on the word "dwara" or "through" in the disposition in favour of the grandsons. The contention of Mr. Somasundaram is that the testator gave an absolute estate to the daughter at the same time expressing a desire that she should leave it to the grandsons. It is no doubt difficult to understand what exactly the testator meant by the word 'through' but we are not able to accept the contention of Mr. Somasundaram that the words by which he intended that the property should go to the grandsons are mere words of recommendation to the daughter. On the other hand, the intention is pretty plain that the estate must go to the grandsons. It is immaterial whether the testator intended that the property should pass to them in the ordinary course of devolution after the death of the daughter or whether he intended the daughter to convey the said property to them. If the testator had really conferred an absolute estate on the daughter and the words used in favour of the grandsons were only words of recommendation leaving the option to the widow to convey the estate to his grandsons or not, the intention of the testator would be frustrated because the words used are "shall pass". On the other hand, if the estate given to the daughter were to be construed as a life estate or a daughter's estate, the intention would be effectuated and the words used in favour of the grandsons could be given effect to. There is another indication to show that he did not mean to give the daughter an absolute estate. The testator was himself a lawyer and a Judge and knew or may be presumed to have known that under the Hindu Law an estate owned by a daughter absolutely would go to her daughters in preference to her sons. Therefore if the daughter took an absolute estate, he must have known that her daughters would get it unless a limitation was placed upon the estate which was going to be conferred upon the daughter. Therefore fully alive to the law he directed that the estate should pass to the grandsons and made a provision in favour of the granddaughters thus:

"After discharging all the said debts, the person who shall be enjoying

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the said properties as aforestated shall pay to my four grand-daughters each a sum of Rs. 25 per annum towards *pasupukunkuma.*"

He would not have cut off his grand-daughters with this annuity unless he intended that they should not get the estate and the obligation to pay the annuity was imposed upon the persons who take his property and they are mentioned in the previous paragraph of the will, namely, the widow, the daughter and the grandsons. It is common knowledge that a Hindu would ordinarily prefer, in the absence of a male issue, that his estate should go to his daughter's son in preference to his daughter's daughter, both on account of natural love and affection and also on religious grounds which every pious Brahmin might be expected to have in view. The testator knew that the religious efficacy conferred by a daughter's son in regard to funeral ceremonies and oblations is equal to a son. Therefore it is quite natural to expect that a testator like Buchi Sundara Rao would desire that the estate would ultimately go to his grandsons in preference to his grand-daughters. As observed by their Lordships of the Privy Council in *Mahomed Shumsool* v. *Shewukram*[1], in construing the will of a Hindu, it is not improper to take into consideration what are known to be the ordinary notions and wishes of a Hindu in respect of devolution of property. There is again another indication that the daughter was not intended to take the property absolutely. In making a provision for the discharge of debts he enjoins that they should be discharged out of the annual income and he does not empower the widow or the daughter to alienate the corpus. No doubt such a power of alienation is not necessary and it can well be understood to have comprised in a pure gift to a widow or a daughter *simpliciter*. But in the context the absence of express words as to power of alienation would seem to connote that the estate intended to be conferred upon the daughter was not absolute.

The question therefore arises, did he intend to confer only a life estate or a daughter's estate? It seems to us that he meant to give a daughter's estate rather than a life estate. He omits the words "during her life" with reference to the disposition in favour of the daughter. The words "pass to my daughter" would rather indicate that in the ordinary course of devolution the estate should pass to her, that is, the daughter

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1. (1874) L.R. 2 I.A. 7 (P.C.).

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and then to the grandsons. The words used in favour of the grandsons seem to indicate that the estate conferred on the daughter was not a life estate because there is no direct gift in favour of the grandsons, but on the other hand, what he says is that through his daughter the estate shall pass to his grandsons. Either he must have intended that the daughters should convey the property either by will or *inter vivos* to the grandsons or she having taken the estate, through her it should pass to the grandsons in the ordinary course of devolution. If it was the daughter's estate that was intended to be conferred, there can be no question that the estate taken by the grandsons is not a vested interest. No doubt there have been expressions of view that it is possible to have a vested remainder after a limited estate of a Hindu widow or a daughter. (Vide *Ratna Chetti* v. *Narayanaswami Chettiar*[1].) But it seems to us that it is not possible to have a vested remainder after conferring a limited estate analogous to that of a woman's estate under the Hindu Law. The holder of such an estate whether she be a widow or a daughter would fully represent the inheritance. There is nothing to vest in anybody else. The observations of the Privy Council in *Mussammat Bhagbutti Dabee* v. *Chowdry Bholanath Thakoor*[2] seem to be almost decisive of the matter. The question pointedly arose in that case whether an estate taken by a wife under the will of her husband was a life estate or a Hindu widow's estate under the law and the gift over in favour of the adopted son was a vested or a contingent remainder. Their Lordships pointed out that if it was a life estate, the adopted son would take a vested remainder; if it was an estate of a Hindu widow, the estate taken by the adopted son would be a contingent remainder. In that case their Lordships held that the estate taken by the widow was a life estate and that taken by the adopted son was a vested remainder. If it is assumed in this case that there is a direct gift in favour of the grandsons, the estate taken by them would be a contingent remainder. But there is no direct gift in their favour and whether the estate taken by the daughter was viewed as a mere daughter's estate and the words used in favour of the grandsons were intended to connote a power vested in the daughter to convey the property or the words meant that the

1. (1914) 26 M.L.J. 616.
2. (1875) L.R. 2 I.A. 256: I.L.R. 1 Cal. 104: 24 W.R. 168 (P.C.).

property should be taken by the grandsons in the ordinary course of devolution is immaterial. But it was not the intention of the testator that the daughter should take an absolute estate but only the limited estate of a daughter.

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In the view which we have taken that the daughter took a daughter's estate, there can be no vested remainder which is liable to be attached by the first defendant. But in so far as the plaintiff sued for a declaration that she has got an absolute estate in the suit properties, her suit fails and has to be dismissed. We direct each party to bear his own costs both here and in the Court below.

B.V.V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE KUNHI RAMAN.

Varada Bhaktavatsaludu and another .. *Appellants** *(Plaintiffs)*

v.

Damojipurapu Venkatanarasimha Rao (dead) and others .. *Respondents (Defendants 1 to 4 and L. Rs. of 1st Defendant).*

Varada Bhaktavatsaludu v. Venkatanarasimha Rao.

Limitation Act (IX of 1908), S. 7—Hindu Law—Eldest brother manager of joint family—Capacity to give discharge—Effect on minor brothers' right to sue—Presumption as to capacity to give discharge.

When there is an eldest member of a family the presumption is that under the Hindu Law he is the manager of the family. If he is the manager, under S. 7 of the Limitation Act, discharge can be given without the concurrence of the other members of the family so far as the Madras Presidency is concerned.

Case-law referred to.

If anybody wants to displace the ordinary presumption that the eldest member acted as the manager and he was not in a position to give a valid discharge it is incumbent on that person to prove the facts rebutting the said presumption.

Ganga Dayal v. *Mani Ram*, (1908) I.L.R. 31 All. 156, not approved.

Appeal against the decree of the Court of the Subordinate Judge of Ellore dated 10th February, 1936, in O. S. No. 6 of 1933.

P. V. Rajamannar and *K. Subba Rao* for Appellants.

P. Somasundaram for Respondents.

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* Appeal No. 301 of 1936. 2nd October, 1939.

Varada Bhakta-vatsaludu v. Venkata-narasimha Rao.

Venkata-ramana Rao, J.

The judgment of the Court was delivered by

Venkataramana Rao, J.—This is an appeal from the judgment and decree of the learned Subordinate Judge of Ellore dismissing the plaintiff's suit on the ground that it was barred by limitation. The relevant facts may be shortly stated. The plaintiffs and the fourth defendant are the sons of one Varada Venkataramanayya. During his lifetime Varada Venkataramanayya as manager of his family entered into a partnership with defendants 1 to 3 for the carrying on of a mill business known as Gopalakrishna Rice Mill. He died on the 12th November, 1927, without adjusting his accounts with the partnership. This suit has been laid by the plaintiffs who were admittedly minors on the 29th October, 1931, for a declaration that the partnership which their father carried on with defendants 1 to 3 must be deemed to have been dissolved on the 12th November, 1927, and for taking an account of the partnership and for payment of such sums as may be found due and payable appertaining to their father's share. The main defence was one of limitation. The suit admittedly was instituted more than three years from the date of the death of Venkataramanayya. In the absence of an agreement to the contrary, the partnership must be deemed to have been dissolved on the date of the death of Venkataramanayya and under Art. 109 the suit must be laid within three years from that date. But what the plaintiffs contend is that the plaintiffs were minors on the date of the death of their father and even on the date of suit were admittedly minors and therefore under S. 6 of the Limitation Act their suit must be deemed to be within time. But the defendants contend in answer that the fourth defendant was the eldest brother of the family and he attained his majority in July, 1927, that is, before the death of their father and he was therefore in a position to discharge all the claims made in the suit and the suit must be held to be barred under S. 7 of the Limitation Act. Therefore two main questions have to be decided, namely, (1) whether the fourth defendant attained majority in 1927 or in 1929 as contended by the plaintiffs-appellants in this case and (2) even assuming that the fourth defendant attained majority in 1927, was he in a position to give a discharge of the plaintiffs' claim. On both the points the learned Subordinate Judge's decision was in favour of the defendants. Mr. Subba Rao on behalf of the plaintiffs-appel-

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lants contends that the learned Judge was wrong in finding that the fourth defendant attained majority in 1927. He says that the burden of proving that the fourth defendant attained majority in 1927 was on the defendants and they have not satisfactorily discharged the burden of proof which lay on them. He points out that the only material documents in the case are Exhibits III and III-A wherein the fourth defendant's age was described as 16 in 1925 and therefore he could not have attained majority in 1 27. What he says is that in India it must be presumed that the people generally give the running year as their age and not the completed year. For this position he relies upon the ruling in *Kunhi Kannan* v. *Devaki*[1]. It may be so, but the evidence does not rest on Exhibits III and III-A. P.W. 3, the uncle of the plaintiffs, and the fourth defendant was examined on behalf of the plaintiffs and he states that his first son was born in the month of Jeshta in the year Sadharana which is between 8th June, 1910 and 6th July, 1910, and that the fourth defendant was one year or a year and a half older than his first son. This evidence was accepted by the learned Judge in the Court below and on this evidence coupled with the statements contained in Exhibits III and III-A and the deposition of the fourth defendant himself he has come to the conclusion that the fourth defendant must have attained majority at the beginning of 1927. P. W. 3 is certainly a near relation of the plaintiffs. Mr. Subba Rao contends that the age given by him was mere guess work but we cannot brush aside his evidence on that ground. We are therefore not in a position to disturb the finding of the learned Judge.

The next question is whether the fourth defendant was in a position to give discharge within the meaning of S. 7 of the Limitation Act. Mr. Subba Rao says that if the fourth defendant really acted as manager of the family he was not prepared to dispute the capacity of the fourth defendant to give a valid discharge of the plaintiffs' claim but what he contends is that it is not enough to show that the fourth defendant has attained majority in 1927 but it must also be shown that as a fact he was acting as manager and the evidence in this case does not establish that fact. It seems to us that when there is an eldest member of a family, the presumption is that under the Hindu Law he is the manager of the family. If he is the manager,

1. (1939) 2 M.L.J. 619.

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under S. 7 of the Limitation Act discharge can be given without the concurrence of the other members of the family so far as the Madras Presidency is concerned, and at any rate that is the *ratio decidendi* of *Doraisami Serumadan* v. *Nondisami Saluvan*[1]. What Mr. Subba Rao says is that in that case the learned Judges assumed that the plaintiff had the capacity but they did not purport to decide whether the plaintiff acted as the manager and that under the Privy Council ruling in *Jawahir Singh* v. *Udai Parkash*[2] which confirms *Ganga Dayal* v. *Mani Ram*[3], it must be shown as a fact that the fourth defendant acted as manager. So far as *Ganga Dayal* v. *Mani Ram*[3] is concerned our view is that in that case even though the elder brother was the manager, he would not be in a position to give a valid discharge of the claim because under the law prevailing in Allahabad no member of an undivided family even if he is a manager can alienate his undivided share without the concurrence of the other members. No doubt the case was not rested on that ground. But it seems to us that that case can be distinguished and the Privy Council in *Jawahir Singh* v. *Udai Parkash*[2] merely accepted the decision of the learned Judges of the High Court who purported to follow *Ganga Dayal* v. *Mani Ram*[3] and dissented from *Doraisami Serumadan* v. *Nondisami Saluvan*[1]. We cannot take the said Privy Council decision as authority for the position laid down in *Ganga Dayal* v. *Mani Ram*[3] that it must be shown in every case that he has acted as the manager. If anybody wants to displace the ordinary presumption that the eldest member acted as the manager and he was not in a position to give a valid discharge it is incumbent on that person to prove the facts rebutting the said presumption. Mr. Subba Rao says that the evidence in this case showed that the fourth defendant was not acting as manager. He relies on three facts (1) notice, Ex. D in 1928 by the fourth defendant and his mother acting on behalf of the minors. According to him this shows that the fourth defendant did not purport to give notice on behalf of the minors. Therefore it must be taken that he could not be manager at the time when the notice was given. Secondly, he says there was no property in respect

1. (1912) 25 M.L.J. 405: I.L.R. 38 Mad. 118 (F.B.).
2. (1925) 50 M.L.J. 344: L.R. 53 I.A. 36: I.L.R. 48 All. 152 (P.C.).
3. (1908) I.L.R. 31 All. 156.

whereof the fourth defendant could act as manager as the mill was admittedly in the possession of the partners. Thirdly, in the written statement it was alleged by the defendants that the plaintiffs and the fourth defendant were collecting rents from their houses and there were receipts available which were passed by the plaintiffs' mother herself. Taking Ex. D, it does not follow that the fourth defendant was not acting as the manager. Ex. D shows that both the fourth defendant and the other members of the family were acting together. This goes to negative the case made by the fourth defendant that he was not living with the mother and the other members of the family but was living separately from the other members. The fact that the mother's name is associated as the guardian may be due to the fact that there was a joint notice individually and on behalf of the members and the Vakil thought it better to put the mother as the guardian. As regards the question as to the property, the learned Judge holds that Exs. III and III-A show that besides the house in which rice mill is situated there are some lands. No doubt the rice mill was in the possession of defendants 1 to 3 but there were other properties such as lands and house from which rents were being collected and it is not shown that the fourth defendant was not realising rents from those lands. In regard to the allegations in the written statement there is absolutely no date given as to when the plaintiffs' mother collected the rents. No receipts of rents given by the plaintiff's mother were produced and it is not possible to predicate that the plaintiffs' mother was collecting rents of the property from the date of the death of the father of the plaintiffs and the fourth defendant.

The learned Judge refers to Exhibit II which proved that in 1935 when the family house was sold the fourth defendant received an advance of Rs. 100 for showing that even so late as 1935 he was acting on behalf of the family. From this the learned Judge infers that the fourth defendant must have throughout acted as manager. We cannot say that this inference is wrong. On the whole we are not prepared to disturb the finding of the learned Judge that the fourth defendant was in law the manager and also in fact the manager. In view of this finding the appeal fails and must be dismissed with costs. The appellant should pay the court-fee due to Government.

K. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Nanjappa Goundan .. *Appellant* (Defendant)*

v.

Rangaswami Goundan .. *Respondent (Plaintiff).*

Nanjappa Goundan *v.* Rangaswami Goundan.

Transfer of Property Act (IV of 1882), S. 108 (g)—Sub-lease of remainder of term of lease—If an assignment of lease or a sub-lease — Payment by sub-lessee of a charge-holder—If entitled to deduction from rent—Transfer of Property Act, Ch. V including S. 108—Applicability to agricultural leases.

A lessee *R* sued *N* his sub-lessee for arrears of rent due on the basis of the sub-lease granted by him. *N* claimed deduction of the amount paid by him to a maintenance charge-holder whose amounts had fallen into arrears. He also pleaded that the sub-lease being of the residue of the term the sub-lease was in the nature of an assignment of the lease.

Held, (*a*) that the principle of English law regarding sub-lease of the residue of the term would not apply to India. *Hunsraj* v. *Bejoylal Seal,* (1929) 58 M.L.J. 293: L.R. 57 I.A. 110: I.L.R. 57 Cal. 1176 (P.C.), followed.

(*b*) that under the covenant for quiet enjoyment the lessee was liable to see that the charge was paid and hence under S. 108 (*g*) of the Transfer of Property Act the sub-lessee would be entitled to the deduction claimed. *Ishwara Shetty* v. *Ramappa Shetty,* (1934) 40 L.W. 545, followed.

(*c*) that though the Transfer of Property Act cannot in terms apply to agricultural leases its principle was applicable to the case as rules of justice, equity and good conscience. *Krishna Shetti* v. *Gilbert Pinto,* (1919) 36 M.L.J. 367: I.L.R. 42 Mad. 654 (F.B.), followed.

Appeal against the decree of the District Court of Coimbatore in A. S. No. 66 of 1935 preferred against the decree of the Court of the District Munsif of Coimbatore in O. S. No. 640 of 1934.

T. E. Ramabhadrachariar for Appellant.

M. Murugappa Chettiar for Respondent.

The Court delivered the following

JUDGMENT.—The main question for determination in this second appeal is a short one and it arises on the following facts. The property in suit originally belonged to the respondent and his brother. It was sold to one Ramaswami Goundan subject to a charge for Rs. 100 per annum for the maintenance of one Minakshi, the widow of a deceased coparcener of the family. Ramaswami subsequently leased the property for an annual rent of Rs. 125 to the respondent for a term of five years commencing from 13th May, 1926, Ramaswami himself

* S. A. No. 232 of 1936. 3rd November, 1939.

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undertaking to pay the maintenance due to Minakshi. On 4th August, 1928, the respondent sub-leased the property to the appellant herein under Ex. A for the remainder of the term. Ramaswami was adjudicated insolvent sometime in 1928 and his interest in the property having been brought to sale by the Official Receiver in public auction, it was knocked down to the appellant as the highest bidder on 1st March, 1930, but the sale was completed by the Official Receiver executing the necessary conveyance (Ex. IV) only on 2nd December, 1930. In the meantime, however, Minakshi demanded payment of the arrears of maintenance due to her up to 21st January, 1930, that is, in respect of a period prior to the auction sale held by the Official Receiver and the appellant paid Rs. 215 to her on 27th April, 1930, in satisfaction of that claim. Similarly, he paid her another sum of Rs. 100 on 27th May, 1931, for maintenance which fell due on 21st of January, 1931. To the respondent's claim in this suit for the rents due under the sub-lease Ex. A, the appellant pleaded that he made these payments under the instructions and on account of the respondent and that, if these amounts and the admitted payment of Rs. 125 as advance rent for the first year of the sub-lease were given credit to, nothing would be found payable to the respondent by way of rent under Ex. A.

The learned District Munsif upheld this plea and dismissed the suit. On appeal, however, the learned District Judge held that it was not proved that the respondent had authorised or required the appellant to pay the maintenance due to Minakshi, and that the payments by the appellant must be regarded as having been made to protect his own interest as purchaser of the property and not *qua* tenant of the respondent. He therefore decreed the suit.

The appellant's learned counsel assailed this decision on two grounds. First he contended that though Ex. A purports to be a sub-lease, it must in law be regarded as an absolute assignment of the lease to the respondent, as the rent reserved by it was the same as the rent reserved in that lease and it was for the entire residue of the term. It was therefore urged that the question must be viewed as one arising between the original lessor Ramaswami and the appellant, and as the former was undoubtedly bound to pay the maintenance allowance to

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Minakshi but neglected to pay, the appellant was entitled to pay it to her and to deduct it from the rent due. This contention is clearly untenable. It is no doubt true that in English Law an underlease for the whole residue of the term operates as an assignment but as pointed out by their Lordships of the Privy Council in *Hunsraj* v. *Bejoylal Seal*[1], the law in India is different in this respect, having regard to the provisions of the Transfer of Property Act. No question of assignment can therefore arise.

It was next contended that under S. 108 (*c*) of the Transfer of Property Act, the respondent was bound to secure quiet enjoyment of the leased property for the appellant and as Minakshi demanded the arrears of maintenance due to her which, in default of payment, might have been collected by the sale of the leased property on which such arrears were charged, the appellant was entitled to protect himself from the threatened interruption to his enjoyment by paying the amounts due to her and deducting such payments with interest from the rents due to the respondent under S. 108 (*g*) of that Act. I am of opinion that this contention, so far as it relates to the payment of Rs. 215, is correct and must be accepted. It will be seen from the relevant dates already mentioned that the sum of Rs. 215 represented arrears of maintenance due in respect of a period prior to the auction-sale held by the Official Receiver, and when the amount was paid to Minakshi, the appellant had not obtained title to the property from the Official Receiver but held it only as a sub-lessee with about a year of the term still to run. That being the position, the respondent, though as between himself and his lessor Ramaswami he was not bound to pay the maintenance due to Minakshi, was, by reason of the covenant for quiet enjoyment under the sub-lease Ex. A, bound to pay the arrears due to her in a question with the appellant, as otherwise the property would have been brought to sale in enforcement of the charge held by her and the appellant's enjoyment would have been interrupted. I am therefore of opinion that as between the appellant and the respondent, the latter was bound to make the payments due to Minakshi within the meaning of S. 108 (*g*) of the Transfer of Property Act and that such payments not having been made by him,

1. (1929) 58 M.L.J. 293: L.R. 57 I.A. 110: I.L.R. 57 Cal. 1176 (P.C.).

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the appellant was entitled to make the payments himself as he did and to deduct it with interest from the rents claimed by the respondent in this suit. This does not however apply to the payment of Rs. 100 which was made by the appellant after the sub-lease had expired and he had become the owner of the property.

The appellant's learned Counsel cited a decision of Pandalai, J., reported in *Ishwara Shetty v. Ramappa Shetty*[1], as supporting this view. At first sight, it might appear that the case is distinguishable as the lessor there was under a liability as mortgagor to pay the claim of a third party, whereas here, as already observed, the respondent was not bound to pay either as between himself and Ramaswami or direct to Minakshi the amount of the maintenance due to the latter. But on a closer examination of the facts which are somewhat complicated, it will be seen that the lessee who paid off the mortgage payable by the lessor brought the suit to recover the money paid from the assignee of the reversion, and the ground of decision apparently was that, as between him and the lessee, he was bound to pay the mortgage amount by reason of the burden of the lessor's covenant for quiet enjoyment having passed to him with the reversion under S. 109, and the lessee was therefore entitled to recover the amount from him under S. 108 (*g*). So read, the decision can be regarded as an authority in support of the appellant's contention.

The learned Counsel for the respondent argued that the lease in question here being a lease for agricultural purposes, the provisions of Chapter V including S. 108 are not applicable as provided in S. 117. But the reason underlying this exemption of agricultural leases is explained in *Krishna Shetti* v. *Gilbert Pinto*[2], where it is pointed out that in the absence of any special usage or custom affecting an agricultural lease, the principle of the sections which merely reproduce the well-established rules of English law are applicable to agricultural leases also as rules of justice, equity and good conscience.

The appeal therefore succeeds to the extent of the sum of Rs. 215 paid by the appellant to Minakshi on 27th April, 1930 and the decree of the lower appellate Court will be modified by

1. (1934) 40 L.W. 545.
2. (1919) 36 M.L.J. 367: I.L.R. 42 Mad. 654 (F.B.).

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the said sum being deducted from the respondent's claim as on that date. The parties will pay and receive proportionate costs throughout.

Leave granted.

K. S. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE KUNHI RAMAN.

Akki Dodda Basappa .. *Appellant* (Plaintiff)*

v.

Akki Mallamma and another .. *Respondents (Defendants 1 and 2).*

Dodda Basappa *v.* Mallamma.

Hindu Law—Widow—Maintenance—Decree for, against joint family—Subsequent partition—If a charge in circumstances necessitating a modification of the decree.

If when a member of an undivided family dies leaving him surviving his widow and his sons and brothers her right to maintenance is against the entire joint family composed of the sons and brothers of the husband. It may be that if she waits until a partition takes place she may have a lesser right, that is, instead of a right over those persons who take her husband's share. But if before partition is effected, she gets her right declared, defined and reduced to a certainty by a decree of Court, her rights cannot be taken away by any subsequent partition effected among members of the family.

Case-law discussed.

Lakshmidevamma v. *Veera Reddi*, (1939) 2 M.L.J. 340 : I.L.R. (1939) Mad. 877 (F.B.), referred to and explained.

Where a widow has secured a charge on certain properties the charge is not defeated by any subsequent transfer of the said properties by the members of the family and she is entitled to enforce the charge in the hands of the transferee. Partition would be a subsequent transfer and her charge is liable to be enforced in respect of the properties charged in whosesoever's hands the properties may be.

Appeal against the decree of the District Court of Bellary dated 13th October, 1936, in O. S. No. 29 of 1936.

V. S. Narasimhachar for Appellant.

D. R. Krishna Rao and *K. Umamaheswaram* for Respondents.

The judgment of the Court was delivered by

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* Appeal No. 295 of 1936. 16th October, 1939.

Dodda Basappa v. Mallamma.

Venkataramana Rao, J.

Venkataramana Rao, J.—This is an appeal from the decree of the learned District Judge of Bellary dismissing the plaintiff's suit for a declaration that the decree passed in O. S. No. 3 of 1928 on the file of the Sub-Court of Bellary against himself and the second defendant in favour of the first defendant is not binding on him. The facts are few and not in dispute. The first defendant's husband died in or about 1918 leaving him surviving the first defendant, the second defendant his son by the first wife and the plaintiff his brother. On the date of his death the first defendant's husband was a member of an undivided family consisting of himself, the plaintiff and the second defendant. In 1928 the first defendant filed a suit for maintenance and residence against the plaintiff and the second defendant and obtained a decree on 23rd January, 1929, by which the plaintiff and the second defendant were directed to pay maintenance at the rate of Rs. 40 per month and arrears of maintenance and the maintenance decreed was made a charge on the property described in Schedules A and B to the decree. The decree also directed the plaintiff and the second defendant to put the first defendant in possession of the house, item 2 in Schedule C to the decree and the first defendant was to enjoy the same for her lifetime after which it must revert to the plaintiff and the second defendant. In pursuance of the said decree the first defendant was put in possession of the said house and she had been realising the maintenance in accordance with the terms of the said decree. It is alleged in the plaint that on 18th December, 1935, the plaintiff and the second defendant effected a partition between themselves and that by reason of the said partition the plaintiff was no longer bound by the said decree. The allegation in regard thereto is made in paragraph 5 of the plaint thus:

> "Under Hindu Law the first defendant is entitled to be maintained out of her husband's property and there is no such obligation against the plaintiff after the division of the joint family properties. The decree in O. S. No. 3 of 1928 became inoperative after the division between plaintiff and second defendant. The decree in O. S. No. 3 of 1928 is against the joint family properties and there are no such properties now. There is no personal obligation on the plaintiff to maintain the first defendant."

It is alleged in the plaint that the first defendant agreed to the terms of the division by which the plaintiff was not to be liable under the decree. The main defence of the first defendant was that she was not a consenting party to the division at

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all and that the decree in question was obtained by her against the plaintiff and the second defendant personally as well as against the joint family properties of the family, that no partition made subsequently by the plaintiff and the second defendant without her assent would be of any avail or could legally operate to extinguish the decree obtained by her. The defence of the second defendant was that in the partition effected between himself and the plaintiff he got very little property, that the major portion of the property, was retained by the plaintiff that it would be unjust to shift the burden of the entire decree on him and in any event the decree in O. S. No. 3 of 1928 continued to be binding on all the parties and could not be declared to be not binding on the plaintiff. The learned District Judge dismissed the suit on the ground that the suit was incompetent by reason of S. 47, Civil Procedure Code.

In appeal it is contended by Mr. Narasimhachar, Counsel for the plaintiff-appellant, that by reason of the subsequent partition the plaintiff is no longer bound to maintain the first defendant and the said decree obtained against him must therefore be declared inoperative. He contends that as the decree is a maintenance decree, it is open to the plaintiff to institute a suit by reason of the events that happened subsequent to the date of the decree, that there was a change of circumstances which would necessitate the modification of the said decree and that it is competent to the Court to modify the same in view of the said change of circumstances. He has also urged that the partition is such a subsequent event and under the Hindu Law the obligation to maintain a widow is only from out of her husband's share and as the husband's share has now fallen to the second defendant the proper person to maintain her is the second defendant, the plaintiff's obligation having ceased with the disruption of the family. Mr. Narasimhachar has not been able to cite any authority in support of any of the contentions put forward and he frankly confesses that there is no direct authority on the point. He however contends that the recent decision of the Full Bench in *Lakshmidevamma* v. *Veera Reddi*[1], though not a direct decision on the point would cover the present case. The exact point for decision before the Full Bench was whether the decision in *Subbarayulu Chetti* v.

1. (1939) 2 M.L.J. 340 at 343: I.L.R. (1939) Mad. 877 (F.B.).

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Kamalavalli Thayaramma[1] or the decision in *Narasimham* v. *Venkatasubbamma*[2] was correct. Their Lordships were of the opinion that *Subbarayulu Chetti* v. *Kamalavalli Thayaramma*[1] was wrongly decided and that *Narasimham* v. *Venkatasubbamma*[2] should be followed. *Narasimham* v. *Venkatasubbamma*[2] decided that:

"Where the widow of a coparcener sues for maintenance after there has been a partition, she cannot enforce her right against any of the surviving coparceners except those who have taken her husband's share."

But Mr. Narasimhachar contends that the reasoning on which that decision was based would apply to the case in question. We are inclined to agree with him in this contention. The observations in *Lakshmidevamma* v. *Veera Reddi*[3], on which reliance is placed run thus:—

"There is here a clear statement (referring to Smritichandrika) that the duty of maintaining the widow devolves on the persons who take the property of the deceased undivided member of the family and it is emphasised that the duty is dependent on the taking of the property."

But their Lordships proceed further and remark as follows:

"While the family remains undivided the position is different. The property is held jointly and of necessity the amount required for a widow's maintenance has to be paid out of the estate regarded as a whole, but in no circumstances can she claim an allowance greater than the income of her husband's share in the estate."

It seems to us that these observations would apply to the present case. When a member of an undivided family dies leaving him surviving his widow and his sons and brothers, her right to maintenance is against the entire joint family composed of the sons and brothers of the husband. It may be that if she waits until a partition takes place she may have a lesser right, that is, instead of a right over the entire family, a right over those persons who take her husband's share. But if before a partition is effected, she gets her right declared, defined and reduced to a certainty by a decree of Court, her rights cannot be taken away by any subsequent partition effected among the members of the family. In *Jayanti Subbiah* v. *Alamelu Mangamma*[4], Bhashyam Aiyangar, J., made the following observations which are referred to by the Full Bench with approval:

1. (1911) 21 M.L.J. 493: I.L.R. 35 Mad. 147.
2. (1931) 62 M.L.J. 433: I.L.R. 55 Mad. 752.
3. (1939) 2 M L.J. 340 at 343: I.L.R. (1939) Mad. 877 (F.B.).
4. (1902) 12 M.L.J. 270: I.L.R. 27 Mad. 45.

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"When an undivided Hindu family consists of two or more males related as father and sons or otherwise, and one of them dies leaving a widow, she has a right of maintenance against the surviving coparcener or coparceners, *quoad* the share or interest of her deceased husband in the joint family property which has come by survivorship into the hands of the surviving coparcener, or coparceners, and though such right does not in itself form a charge upon her husband's share or interest in the joint family property, yet, when it becomes necessary to enforce or preserve such right effectually, it could be made a specific charge on a reasonable portion of the joint family property, such portion of course not exceeding her husband's share or interest therein."

These observations are in strict consonance with the theory of Hindu Law that when a member of an undivided family dies, his share survives to all the members of the family and every member has got an interest therein subject to the principle that so long as there is a son, a grandson and a great grandson of the deceased coparcener the share of the deceased coparcener would be taken by the son or grandson or great grandson on a partition on the principle of representation and in their absence only would the shares of the other members be augmented. As observed by West, J., in *Lakshman Ramchandra Joshi* v. *Satyabhamabai*[1]:

"The rule is a consequence of the doctrine that the right of each coparcener extending to the whole estate, it is fully owned as to every part notwithstanding the death of one of the joint tenants."

In fixing the quantum of maintenance the measure has always been taken to be the husband's share but as observed in *Karuppa Koundan* v. *Chinna Nallammal*[2] and also by Varadachariar, J., in *Ramarayudu* v. *Sitalakshmamma*[3], the charge created in her favour need not be limited to the husband's share but in certain circumstances may exceed the husband's share. When therefore the widow has secured her right fixing her claim against the whole joint family and getting a charge on a reasonable portion of the property the right or charge cannot be taken away from her by any subsequent partition between the members of the family. The cases relied on by Mr. Narasimhachar where the maintenance has been reduced or increased according as the circumstances of the family do not affect the question in issue at all, nor can the Full Bench decision be taken as an authority for the position that a right secured by a widow against the entire joint family by a decree of Court is taken away by a subsequent partition between

1. (1877) I.L.R. 2 Bom. 494 at 509. 2. A.I.R. 1927 Mad. 1189.
3. (1937) 46 L.W. 550.

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the members of the family. At the partition it is open to members to stipulate that the widow's maintenance may be paid by any one of the members as in this case by the second defendant and that in default of paymen tthe other members may have a right to contribution or indemnity against the person who under the partition was made liable to pay. But that is an arrangement *inter se* between the members with which the widow has no concern. Where a widow has secured a charge on certain properties that charge is not defeated by any subsequent transfer of the said properties by the members of the family and she is entitled to enforce the charge in the hands of the transferee. In our opinion partition would be a subsequent transfer and her charge is liable to be enforced in respect of the properties charged in whose so ever's hands the properties may be. We are therefore of the opinion that the plaintiff is not entitled to the declaration sought. In view of this it is unnecessary to go into the question whether a suit is competent or not. But there is a question of fact raised by the plaintiff, namely, that the widow was a consenting party to the partition by which the plaintiff's liability came to an end and therefore by reason of the adjustment thus arrived at between all parties his liability under the decree became satisfied. This would strictly be a question under S. 47, Civil Procedure Code and cannot be gone into in an independent suit. Mr. Narasimhachar now requests that the plaint may be converted into a petition under S. 47, Civil Procedure Code. We allow the plaint to be treated as a proceeding under S. 47, in so far as the relief based on adjustment of the decree is concerned and direct the plaintiff to strike out paragraph 5 of the plaint and all other allegations in the plaint in so far as they have a bearing on the question raised in paragraph 5 which has been decided against him by this judgment. We therefore direct the District Judge of Bellary to go into the question whether the first defendant was a consenting party to the partition and agreed to take her maintenance only from the second defendant and agreed to treat the liability of the plaintiff as satisfied under the decree. It is open to the defendants to file a counter-affidavit raising such objections as they may be advised in regard to the premises. Subject to the directions given above, the appeal fails and is dismissed with costs, one set.

K.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Original Matrimonial Jurisdiction.]

PRESENT:—MR. JUSTICE MOCKETT.

Mrs. T. R. Manjula Bai .. *Petitioner**

v.

K. Janoji Rao .. *Respondent.*

Manjula Bai *v.* Janoji Rao.

Indian Divorce Act (IV of 1869), S. 7—Petition for dissolution of marriage by wife—Evidence of cruelty proved in an earlier petition for dissolution of marriage on the same grounds—Decree for judicial separation in the previous petition—Fresh evidence of adultery alone of party called in the later petition—Procedure whether correct.

A petitioner for dissolution of marriage on the grounds of adultery and cruelty, in the absence of fresh matrimonial offence, is not entitled to a decree for dissolution of marriage upon precisely the same grounds as those on which previously in a similar petition she obtained a judicial separation. Courts cannot possibly countenance a petitioner, who had materials for dissolution, refraining from claiming it in her petition and obtaining only a decree for judicial separation, and later on when she thinks it convenient to come to the Court to repeat the same evidence all over again and asking for a decree for dissolution. But if there is besides the decree for judicial separation, entirely fresh evidence of adultery, the petitioner can have a decree *nisi* with costs The petitioner is then entitled to adopt the course of procedure followed here, that is, without letting in afresh evidence of cruelty which had been proved in the previous petition.

Bland v. *Bland,* (1866) 1 Pro. Div. 237, followed.

Collins v. *Collins,* (1928) I.L.R. 56 Cal. 166, referred to.

T. Muniswami Reddi for Petitioner.

The Respondent not represented.

The Court delivered the following

JUDGMENT.—This is a wife's petition for dissolution of marriage on the grounds of adultery and cruelty. She filed O. M. S. No. 17 of 1937 claiming the same relief on the grounds of cruelty and adultery. The learned Judge, on the 6th September, 1938, refused a decree for dissolution of marriage on the ground that adultery had not been proved. But he allowed the petitioner to amend her petition by adding a prayer for an order for judicial separation on the ground of cruelty which had been proved. The petitioner before me relies so far as cruelty is concerned on the decree and judgment of Gentle, J., and so far as adultery is concerned has brought evidence to show that since November of last year the respondent, her husband, has been living with another woman at Trichinopoly. No evidence of cruelty was called before me. Is this procedure

*O. M. S. No. 1 of 1939. 27th September, 1939.

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correct? I think the petitioner was entitled to adopt this course. Under S. 7 of the Indian Divorce Act, the Courts in India act and give relief on principles and rules which in the opinion of the said Courts are as near as may be conformable to the principles and rules on which the English Courts act. No decision in India exactly on the question before me has been cited but I have no doubt whatever that the procedure laid down in *Bland* v. *Bland*[1], a case exactly in point should be followed here. In that case there had (as in this case) been a decree for judicial separation on the ground of cruelty in a previous petition, and in the petition before the Court the following procedure was followed (Page 238) :—

"Proof was given of the marriage, and of adultery committed by the respondent subsequent to the decree for judicial separation. The original decree for judicial separation on the ground of cruelty was before the Court, and evidence was given of the respondent's identity with the respondent in the suit for judicial separation."

That procedure has been followed before me and I find that there is proof, for the purposes of this petition, of cruelty. So far as the adultery is concerned, there is the evidence of the wife, confirmed by the evidence of the husband's landlord, one Sambasivam Pillai, that these people have been living together as husband and wife and are still living together in the same house. The case reported in *Collins* v. *Collins*[2] has no bearing upon this case, except that the procedure in *Bland* v. *Bland*[1] is noted by Rankin, C. J. I would respectfully agree with the decision in *Collins* v. *Collins*[2], which is to the effect that a petitioner, in the absence of a fresh matrimonial offence, is not entitled to a decree for dissolution of marriage upon precisely the same grounds as those on which she obtained a judicial separation previously. As the learned Chief Justice points out, the Courts could not possibly countenance a petitioner who had material for dissolution, refraining from claiming it in his petition and obtaining only a decree for judicial separation, and then later on when he thought it convenient to come to the Court to repeat the same evidence all over again and asking for a decree for dissolution. In this case there is besides the decree for judicial separation, entirely fresh evidence of adultery. The provisions of the Act have therefore been complied with. That being so, the petitioner will have a decree *nisi* with costs.

K. C. —— *Decree nisi granted.*

1. (1866) 1 Pro. Div. 237. 2. (1928) I.L.R. 56 Cal 166.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Minor Anantha Sayana Naidu, by next friend Renu Ammal .. *Appellant* (2nd Plaintiff)*

v.

Kondappa Naidu *alias* Devarajulu Naidu and others .. *Respondents (Defendants 1, 5, 2, 3, 4, 7, 8 and L. Rs. of 6th Defendant).*

Anantha Sayana Naidu *v.* Kondappa Naidu.

Will—Construction of—Words—Meaning to be ascertained from—Absolute gift in favour of wife—Gift over after her lifetime in favour of daughter—Invalid—Nature of estate taken by widow.

A testator after making two wills wrote a third will which ran thus: "I am at present physically weak on account of asthma; as I apprehend that I may not live long, as you are my wife, and as in the wills previously executed (by me), no mention is made about your maintenance, all the properties belong to me, that is, all the movable and immovable properties in these villages, namely, Vallam, Nemili, Vadakkumangalam and Mazhayur, shall after my lifetime be enjoyed by you with powers of alienation by gift, mortgage, sale, etc. and after you, the properties then remaining shall, according to the wills executed by me on 25th July, 1917 and 21st November, 1917, be held and enjoyed by our daughter Kuppammal, with powers of alienation by gift, mortgage, sale, etc." On a construction of the will,

Held, prima facie where powers of absolute disposition are conferred on the donee, it should be taken as an indication that the testator intended to confer an absolute estate on the donee The will conferred powers of alienation of the widest amplitude such as gift, mortgage, sale, etc. The language was wide enough to confer a power of disposition both testamentary and non-testamentary. Therefore, giving the plain grammatical meaning to the above language it would follow that the nature of the interest taken by the widow of the testator was an absolute estate.

Surajmani v. *Rabi Nath Ojha,* (1907) 18 M.L.J. 7: L.R. 35 I.A. 17: I.L.R. 30 All. 84 (P.C.), followed.

It is settled law that if an absolute estate is given to the donee, a gift over on the termination of the life of the donee of the property remaining undisposed of by a donee is invalid, the principle being that once a property is given absolutely to another, the donor cannot dispose of another man's property.

In re *Stringer's Estate*: *Shaw* v. *Jones-Ford,* (1877) 6 Ch. D. 1 at 14, relied on.

By the use of the expression 'maintenance', though the testator indicated a reason for making a provision for his wife, the word did not cut down the interest intended to be conferred on her, the operative portion of the will being absolutely clear.

Appeal against the decree of the Court of the Subordinate Judge of Vellore in A. S. No. 117 of 1933 preferred against

* S. A. No. 1205 of 1934. 24th February, 1939.

the decree of the Court of the District Munsif of Arni in O. S. No. 372 of 1931.

K. Rajah Aiyar and *T. T. Vijayaraghavan* for Appellant.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The question in this second appeal turns upon the construction of a will Ex. III, dated 27th November, 1917, left by one Vijiaraghavalu Naidu. It was his last will and testament. He executed the previous wills Exs. I and II dated 25th July, 1917 and 21st November, 1917, respectively. Before July, 1917, the testator was ill. He had no male issue. He had only a daughter by name Kuppammal. The persons who were the objects of his affection were his wife Chinnammal, the said daughter Kuppammal and her husband Rangaswami Naidu the seventh defendant in this case. He had properties in four villages, namely, Vallam, Nemili, Mazhayur and Vadakkumangalam in the North Arcot District. By his will dated 25th July, 1917, he purported to bequeath his properties in the Vallam village to his daughter Kuppammal and the extent of the bequest is thus stated in the said will:

"She shall hold and enjoy the same from generation to generation with powers of alienation by gift, mortgage, sale, etc."

By his second will dated 21st November, 1917, he purported to make a bequest of the properties both in favour of his daughter and son-in-law the seventh defendant. There are two schedules to the said Will A and B. The A schedule properties comprise the properties in the Vallam village the subject-matter of the prior will and also the properties in Mazhayur village and these he gave to his daughter Kuppammal. The B schedule comprises the properties in the village of Nemili and these he gave to his son-in-law the seventh defendant. The extent of the bequest is stated thus in the said will:

"They shall hold and enjoy the same from generation to generation with powers of alienation by gift, mortgage, sale, etc. If besides these any other properties have been left out, the same shall be got by my daughter Kuppammal."

Six days later he made a third will the construction of which is now in question. It will be seen from the first two wills that no provision was made for his wife Chinnammal and so he purported to make one. It may be necessary to give the

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terms thereof so far as they may be relevant for the decision of the question in issue. It runs thus:

"I am at present physically weak on account of asthma, as I apprehend that I may not live long, as you are my wife, and as, in the wills previously executed (by me), no mention is made about your maintenance, all the properties that belong to me, that is, all the immovable and movable properties in these villages, namely, Vellam, Vadakkumangalam and Mazhayur, shall after my lifetime be enjoyed by you with powers of alienation by gift, mortgage, sale, etc., and after you, the properties then remaining shall, according to the wills executed by me on 25th July, 1917 and 21st November, 1917, be held and enjoyed by our daughter, Kuppammal, with powers of alienation by gift, mortgage, sale, etc."

On the date of his death Chinnammal, Kuppammal and Rangaswami Naidu were alive. Kuppammal died first in 1924 leaving a daughter Vijialakshmi who died six months later. Chinnammal died after June, 1927, having before her death executed three deeds of settlement dated 1st June, 1927, in and by which she disposed all the properties that were bequeathed to her under the said will in favour of defendants 1 to 3, defendants 1 and 2 being her brothers and the third defendant being her sister's son-in-law. The plaintiff is an alienee of a fourth share of the said properties from the seventh defendant who claims to succeed thereto on the ground that after the death of Chinnammal he became entitled thereto. His case is that Chinnammal had only a life interest in the said properties and his wife Kuppammal had a vested remainder and that vested remainder on her death vested in her daughter Vijialakshmi and on the latter's death vested in him as her father. The questions for decision in this case are, what is the nature and extent of interest taken by Chinnammal under the will and whether the deeds of settlement executed by her are valid. If they are valid, the plaintiff's suit fails because no interest would vest in the seventh defendant capable of being disposed of by him. The learned District Munsif was of the opinion that Chinnammal had only a life interest in the said property and the settlement deeds executed by her were invalid. The learned Subordinate Judge reversed this decision holding that Chinnammal took an absolute estate and she was competent to dispose of the properties bequeathed to her under the will. It is against this decision this second appeal has been preferred by the plaintiff.

Mr. Rajah Aiyar who appeared on his behalf contended that the will conferred only a life interest on Chinnammal and the gift over in favour of her daughter took effect. The

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contention of Mr. T. M. Krishnaswamy Aiyar on behalf of defendants 1 and 2 is that Chinnammal took an absolute estate or a life estate with a power of appointment and in either case the settlement deeds were valid. The question is which of these contentions is right. Both the learned Counsel relied upon a number of cases, English and Indian, in support of their respective contentions. Before I deal with the said cases, it is better to remember the rule so often laid down that each will must be construed by itself and all the light that can be got from the decisions serves only to show in what manner the principle of reasonable construction have by Judges of high authority been applied to cases more or less similar—*vide* the observations of Lord Chancellor Selborne in *Waite* v. *Littlewood*[1]. Therefore without reference to cases it is the duty of the Court to ascertain what is the expressed intention of the testator and whether there is anything in law to preclude effect being given to the said intention. The intention has to be collected from the words used in the will having regard to the facts and circumstances respecting persons to which the will relates. The question therefore is, what is the nature and extent of interest conferred on Chinnammal under the terms of Ex. III which is the last will and testament? The language used is:

"shall after my lifetime be enjoyed by you with powers of alienation by gift, mortgage, sale, etc. and after you, the properties then remaining shall",

If the testator had died intestate Chinnammal would have inherited his property and taken a widow's estate therein. She would be the owner for the time being with a restricted power of alienation, which restriction could only be removed by a power of alienation conferred by her husband. The power of alienation may be partial or absolute. Where he confers an unrestricted absolute power of alienation, she will take an absolute estate unless he intended to confer on her by the language used by him a life estate with such a power. Whatever may have been the view taken in some of the early decisions in regard to the nature of the interest taken by a Hindu widow under a husband's gift or will, since the decision of the Privy Council in *Surajmani* v. *Rabi Nath Ojha*[2], it is settled law that:

"If words were used conferring absolute ownership upon the wife, the wife enjoyed the rights of ownership without their being conferred by

1. (1872) 8 Ch. Ap. 70 at 73.
2. (1907) 18 M.L.J. 7: L.R. 35 I.A. 17: I.L.R. 30 All. 84 (P.C.).

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express and additional terms, unless the circumstances or the context were sufficient to show that such absolute ownership was not intended." (*Bhaidas Shivdas* v. *Bai Gulab*[1].)

Prima facie, where powers of absolute disposition are conferred on the donee, it is taken as an indication that the testator intended to create an absolute estate on the donee. The will in this case confers powers of alienation of the widest amplitude, such as gift, mortgage, sale, etc. In my opinion the language is wide enough to confer a power of disposition both testamentary and non-testamentary. Therefore giving the plain grammatical meaning to the said language it would follow that the nature of the interest taken by the widow is an absolute estate. It is settled law that if an absolute estate is given to a donee, a gift over on the termination of the life of the donee of the property remaining undisposed of by the donee is invalid, the principle being that once a property is given absolutely to another, he cannot dispose of another man's property. The principle is sustained on various grounds, such as public policy or repugnancy to the prior estate. It is well expressed by Lord Justice James in In re *Stringer's Estate*: *Shaw* v. *Jones-Ford*[2] thus:

"It is settled by authority that if you give a man some property, real or personal, to be his absolutely, then you cannot by your will dispose of that property which becomes his. You cannot say that, if he does not spend it, if he does not give it away, if he does not will it, that which he happened to have in his possession, or in his drawer, or in his pocket at the time of his death, shall not go to his heir at law if it is realty, or to his next of kin if it is personalty, or to his creditors who may have a paramount claim to it. You cannot do that if you once vest property absolutely in the first donee. That is because that which is once vested in a man, and vested *de facto* in him, cannot be taken from him out of the due course of devolution at his death by any expression of wish on the part of the original testator."

In short, a man cannot create a new course of devolution when a gift is made. The question therefore is whether there is anything in the will which would prevent effect being given to the language employed by the testator which *prima facie* confers an absolute estate. It is no doubt true that although the words are absolute in the first instance, subsequently occurring words may be sufficiently strong to cut down the absolute interest to a life interest. (Vide In re *Jones*: *Richards* v. *Jones*[3].) But before this is done there must be words

1. (1921) 42 M.L.J. 385: L.R. 49 I.A. 1: I.L.R. 46 Bom. 153 at 159, 160 (P.C.).
2. (1877) 6 Ch. D. 1 at 14.
3. (1898) 1 Ch. 438 at 441.

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sufficiently precise and certain to cut down the said interest. It may at once be stated that there are no words in the will in question conferring expressly an heritable estate nor are there words limiting the gift to a life interest or otherwise, but there are words of wide amplitude to make the estate absolute and therefore heritable. Mr. Rajah Aiyar however relied on the following circumstances in support of his argument that what was intended to be conferred was only a life estate; (1) the reason given by the testator for making a provision in favour of his wife is that no mention was made about her maintenance in the prior wills; the use of the word "maintenance" is strongly relied on for the purpose of indicating that it is only a very limited interest that was sought to be conferred on the widow and the power of disposal conferred on her is qualified by this word 'maintenance' so that whatever power she might exercise she could only do for the purpose of maintaining herself; (2) the gift over in favour of the daughter:

> "After you, the properties then remaining shall, according to the wills executed by me on 25th July, 1917 and 21st November, 1917, be held and enjoyed by our daughter Kuppammal with powers of alienation by gift, mortgage, sale, etc."

The argument based on this clause is that the gift over cannot be given effect to unless the prior estate is construed to be a life estate; and (3) having regard to the prior two wills in which the words 'from generation to generation' are used in connection with the bequest in favour of the daughter and the absence of such expression in the bequest in favour of Chinnammal would connote that what was intended to be conferred on Chinnammal could only be a life interest and what was conferred on the daughter was an absolute heritable interest.

In regard to the first ground urged by Mr. Rajah Aiyar based on the use of the word 'maintenance', the context clearly indicates that the words are only expressive of the motive of the gift and did not cut down the interest intended to be conferred on her. Though the testator gave a reason for making provision for her, namely, that he omitted to make any provision in the prior wills for her maintenance, the operative portion of the gift is absolutely clear. The power of alienation is not qualified or restricted to any limited purpose: it is unrestricted. In

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Jogeswar Narain Deo v. *Ram Chand Dutt*,[1] where a testator gave a bequest to his widow and son stating the object of the gift to be for their maintenance, having regard to the unrestricted power of alienation given in the later clause of the will, their Lordships of the Privy Council were not inclined to restrict the extent of the interest conferred by the mere fact that the object was stated to be for their maintenance. Lord Watson says:

"These words are quite capable of signifying that the gift was made for the purpose of enabling them to live in comfort and do not necessarily mean that it was to be limited to a bare right of maintenance." (*Vide* also *Hilalsing Govinda* v. *Udesing Vithal*[2].)

The case in In re *Fox*: *Fox* v. *Fox*[3] is distinguishable. The power to use and enjoy the property was expressly qualified by the words "for her maintenance during her lifetime".

I shall now deal with the second ground urged by Mr. Rajah Aiyar, namely, the argument based on the gift over in favour of the daughter. His contention is that the gifts both in favour of the wife and in favour of the daughter should be construed together and it must be inferred that what was intended to be conferred was a life interest in favour of the wife. In the first instance, the two gifts are independent gifts. The two clauses cannot be read together as forming one gift. Secondly, the fact of a mere gift over should not be taken to cut down a prior absolute interest. The question therefore is, was there an absolute gift to the wife; if so, no question arises with reference to the gift over. It is in this connection that the question arises whether there is anything in the context or in the surrounding circumstances which would show that the testator while giving power of disposition did not intend to confer an absolute estate in the sense that she would take also a heritable estate. One cardinal rule of construction in construing a will is to give effect to every word in the will and try to effectuate the intention of the testator as far as possible and not frustrate it. As observed by Joyce, J., in In re *Sanford*: *Sanford* v. *Sanford*[4]:

"The rule is to construe a will *ut res magis valeat quam pereat*. . . . . . in a case of obscurity or ambiguity, even when the question is one of invalidity on the ground of remoteness, repugnancy, or the like,

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1. (1896) 6 M.L.J. 75: L.R. 23 I.A. 37: I.L R. 23 Cal. 670 (P.C.).
2. A.I.R. 1938 Bom. 125.
3. 62 L.T. 762.
4. (1901) 1 Ch. 939 at 943 and 944.

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weight may be given to the consideration that it is better to effectuate than to frustrate the testator's intention."

In this connection the arguments of Mr. Rajah Aiyar based on the absence in Ex. III of the words 'from generation to generation' used in the wills Exs. I and II may be relevant. In the gift over it is clearly stated that the property should be held and enjoyed by the daughter according to the wills executed by him on 25th July, 1917 and 21st November, 1917, with full powers of alienation. The use of the words 'according to the wills executed by him' would show that in the case of the daughter he meant to have a heritable estate to be enjoyed by her from generation to generation; therefore, if the will were to be construed by giving Chinnammal a life estate with an absolute power of appointment the intention of the testator will be effectuated rather than frustrated. In this view Chinnammal would not take an absolute estate but a life estate with a power of appointment and the gift over will be valid only with reference to what was left undisposed of by Chinnammal. But Mr. Rajah Aiyar contends that either the estate conferred must be an absolute estate or a life estate and to construe a disposition as a life estate with absolute power of appointment is tantamount to construing the disposition as an absolute estate. There is considerable force in the argument of Mr. Rajah Aiyar but the law does make a distinction between an absolute estate and a life estate with a power of appointment. In the one case what is conferred is property, that is, the interest conferred is capable not only of disposition by the donee but capable of transmission to his heirs and in the case of the other, that is, a life estate with a power of appointment, what is conferred is not property but power. The distinction between a power of appointment over property and property has always been well recognised—*vide* Ex parte *Gilchrist*: In re *Armstrong*[1]. "No two ideas can well be more distinct the one from the other than those of 'property' and 'power'," as Lord Justice Fry points out in the same case at page 531. Both in England and in India it is well settled that it is open to a person to make a disposition of the property either *inter vivos* or by will so as to confer on a donee a life estate with a power of appointment—*vide* In re *Stringer's Estate*: *Shaw* v. *Jones-Ford*[2], In re *Sanford*: *Sanford* v. *Sanford*[3], *Saroda Sundari*

1. (1886) 17 Q.B.D. 521 at 526.
2. (1877) 6 Ch. D. 1.
3. (1901) 1 Ch. 939.

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Dassi v. *Kristo Jiban Pal*[1] and *S. M. Hara Kumari Dasi* v. *Mohim Chandra Sarkar*[2].

Mr. Rajah Aiyar relied on a number of cases where a distinction is drawn between cases where a power of testamentary disposition is conferred and where no such power is conferred for indicating that what was conferred on Chinnammal was only a life estate limited to enjoyment *in specie* for the bare purpose of maintenance. Having regard to the construction placed by me that the power of disposition conferred in this case would include a testamentary disposition and having regard to the fact also that the dispositions in this case were all *inter vivos*, I think it unnecessary to deal with those cases. I also think it unnecessary to deal with the question regarding the nature of the estate taken by a Hindu widow on whom the widow's estate with an absolute power of alienation is conferred based on the decision in *Thayalai Achi* v. *Kannammal*[3] and whether in such a case a gift over will be valid. In this case whatever view is taken, whether it is an absolute estate conferred on Chinnammal or only a life estate with a power of appointment or a widow's estate with a power of appointment, the deeds of settlement are valid.

The result is that the plaintiff's suit fails and the second appeal is dismissed with costs.

Leave to appeal granted.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT.

Boda Subba Rao .. *Petitioner** (*Plaintiff*)

v.

Kandregula Narsiah .. *Respondent* (*Defendant*).

Subba Rao v. Narsiah.

Limitation Act (IX of 1908), S. 4—Filing of suit for Rs. 20 in District Munsif's Court on reopening day, limitation having expired during vacation—Cognizability of suit by Village Court under Madras Village Courts Act (I of 1889)—Effect—Civil Procedure Code, S. 15—"Court of lowest grade competent to try"—Village Court if such a Court.

In a suit for Rs. 20 balance due under a pronote the limitation for filing which had expired when the Court was closed,

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1. (1900) 5 C.W.N. 300. 2. (1908) 12 C.W.N. 412.
3. (1934) 68 M.L.J. 707.

* C. R. P. No. 214 of 1937. 8th December. 1939.

Subba Rao v. Narsiah.

Held, the period of limitation allowed by S. 4 of the Limitation Act cannot be cut down by any implication. Plaintiff is entitled to sue in the District Munsif's Court and there is no compulsion to go to the Village Munsif's Court and a plaintiff was entitled to wait until the reopening of the District Munsif's Court, though the Village Munsif's Court was open. The Court of lowest grade competent to try in S. 15, Civil Procedure Code, is the Districr Munsif's Court and not the Village Munsif's Court.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Ramachandrapur in S. C. S. No. 162 of 1936.

N. Bapiraju for Petitioner.

M. S. Ramachandra Rao for Respondent.

The Court delivered the following

JUDGMENT.—A short point is raised in this petition on which there is no authority whatever. The plaintiff-petitioner sued the defendant on the balance of a promissory note for Rs. 20. The promissory note is dated the 5th July, 1927, renewed by payment on the 13th June, 1930, and again on the 12th June, 1933, so that it would become barred on the 12th June, 1936. The District Munsif's Court of Ramachandrapur was closed for the long vacation from the 9th May, 1936, to the 19th June, 1936. The 20th was the penultimate Saturday, and the 21st was a Sunday, aad so the petitioner filed his suit on the 22nd June, 1936. It is not contended that under ordinary circumstances, the suit would be within time; but the point was taken before the learned District Munsif that this was a suit which is cognizable by a Village Court under S. 13 of the Madras Village Courts Act. That is so. It is therefore argued that this suit could have been filed in the Court of the Village Munsif which was open during the vacation of the Court of the District Munsif and that it became barred on the 12th June, 1936, and any period subsequent thereto is not available to the plaintiff. The District Munsif took the view that the plea of limitation on which the defendant relied before him was well founded. He rested that finding on the fact that:

"Normally the suit ought to have been filed in the Village Court and simply because the suit is barred by time the plaintiff cannot take advantage of the concurrent jurisdiction of this Court to try suits which are primarily triable by Village Courts."

Before me reliance has been placed by both sides on S. 20 (*a*) of the Madras Village Courts Act, which states that if a suit which is triable by a Village Court is instituted in the Court

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of a District Munsif, he may, unless sufficient reasons exist to the contrary, transfer it to the Village Court. I may also refer to sub-S. (2). It is argued that the spirit of the Act is that suits of this value should in the first place be tried under the Village Courts Act. There are of course two great differences between the two tribunals. The District Munsif's Court is regulated by the provisions of the Code of Civil Procedure. The Court of the Village Munsif is not. The latter view seems to me to be the effect of the decision in *Augustus Brothers* v. *Fernandez*[1]. If that is so I think it is right not to apply S. 15, Code of Civil Procedure, to a suit of this sort. S. 15, Code of Civil Procedure, says:

"Every suit shall be instituted in the Court of the lowest grade competent to try it,"

and I think that must refer to Courts subject to the Code. The procedure of the Village Courts is very special and decidedly of a comprehensive character. I notice however that although the provisions of the Indian Limitation Act will apply to suits under the Village Courts Act (S. 20)—there is no provision applying the Code of Civil Procedure to such suits.

The point which I have to decide appears to have behind it no authority—that I have already indicated—and I must therefore decide the question as a matter of first impression after hearing the interesting arguments of learned Counsel on either side. In the absence of authority I do not consider that the period allowed by S. 4 of the Limitation Act was intended to be cut down. I do not think that I ought to imply that a litigant should be deprived of his right to go to a normal Court subject to normal procedure because a Court of a very special nature—the Village Court, happened to be open to him. To take away the right given by the Limitation Act requires, I think, some more substantial basis than implication. *Prima facie*, the plaintiff is entitled to sue in the District Munsif's Court. There is no compulsion to go to the Village Munsif's Court. *Prima facie* owing to the long vacation of the District Munsif's Court and the dates of the promissory note the plaintiff was entitled under S. 4 of the Limitation Act to wait until the 22nd June before filing the suit. In the absence of authority I see no reason why that right should be curtailed.

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1. (1915) 29 M.L.J. 474.

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The result is in my view this petition should be allowed with costs in this Court; but in the lower Court each side will bear its own costs. The matter will go back for decision by the District Munsif. It will be open to the defendant to raise any points other than the point that the plaintiff had agreed to give up his claim which has already been decided. The defendant indicates that he will rely upon the terms of the Madras Agriculturists Relief Act.

K. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Viswanadhula Gurayya and another .. *Petitioners** (*Defendants*)

v.

Danturthi Venkataratnam.. *Respondent* (*Plaintiff*).

Gurayya *v.* Venkataratnam.

Madras Estates Land Act (Amending Act XVIII of 1936)—Suit in Court having jurisdiction before the Act—Jurisdiction if lost by reason of the Act.

In a suit for rent in the Civil Court issues were framed and on a Civil Revision Petition which was allowed it was remanded for fresh disposal. The defendants then took the objection in an additional written statement that the Court had no jurisdiction by virtue of Act XVIII of 1936, under which the Court having jurisdiction would be a Revenue Court.

Held, the Civil Court ceased to have jurisdiction after the passing of the Act and when it was brought to the notice of the Court it was bound to stop the case and return the plaint.

Kondappa Naidu v. *Mahalakshmamma,* (1938) 1 M.L.J. 206 and *Kotayya* v. *Ramakrishnayya,* (1937) 2 M.L.J. 573, followed.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsiff of Cocanada dated 22nd March, 1937 and passed in S. C. S. No. 763 of 1934.

C. Rama Rao for Petitioners.

K. Bhimasankaram for Respondent.

The Court delivered the following

JUDGMENT.—The respondent to this petition brought a suit for rent. Certain objections were taken and issues framed. The matter was then brought up to this Court in revision and the then learned Chief Justice allowed the revision petition in part and remanded the suit to the lower Court for fresh disposal.

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* C. R. P. No. 1069 of 1937. 19th October, 1939.

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After remand, the defendants put in an application to file an additional written statement to the effect that the Court had no jurisdiction by virtue of the passing of Act XVIII of 1936 by the provisions of which the petitioners became ryots of land situated within an estate, within the meaning of the Madras Estates Land Act, and that therefore a suit for rent would lie only in a Revenue Court. That petition was dismissed on the ground that the plea had been raised too late.

It seems to have been admitted even in the lower Court—and it certainly has been here—that the rent is payable on land lying within an "estate". That being so, the Court having jurisdiction would be a Revenue Court; and the only question that arises in this petition is whether the Court that had jurisdiction to entertain the suit, lost jurisdiction subsequently on account of the passing of the Act. It is argued that if a Court had lawful seisin of the matter, it could not lose it merely because of the passing of a subsequent enactment, unless there is an express provision depriving Courts of jurisdiction in pending suits. Such a provision one does not find in Act XVIII of 1936. Two cases have been discussed before me bearing on this point. One is *Kondappa Naidu* v. *Mahalakshmamma*[1], which was decided by a Bench of this Court, in which the judgment was delivered by Venkatasubba Rao, J. That was a case in which there had been a stay of pending Letters Patent Appeal because of S. 127 of the 1934 Act. It was taken up for hearing again only after the passing of Act XVIII of 1936. S. 13 of that Act provides that all proceedings stayed under S. 127 of the 1934 Act shall be disposed of as if the Act of 1908 as amended by the 1934 and 1936 Acts had been in force at the original institution of the proceedings. The learned Judges could therefore have decided the case on that point; but although Venkatasubba Rao, J., refers to S. 3 in passing, the learned Judges preferred to go beyond the narrow limitations of S. 13 and to decide the case on a much broader principle of law. Venkatasubba Rao, J., says:

> "By reason of the new definition of the word "estate", the village must be deemed to have always and throughout been an estate."

That means that even though the suit was filed before the passing of the Act, the Court must be deemed to have had no jurisdiction to entertain the suit and that the plaint had to be

1. (1938) 1 M.L.J. 206.

returned for re-presentation to a Revenue Court. That was what was actually ordered in that case. In *Kotayya v. Ramakrishnayya*[1], Venkataramana Rao, J., considered a case in which there had been no stay under S. 127 of the 1934 Act and to which therefore, S. 13 of Act XVIII of 1936 did not apply. Venkataramana Rao, J., came to the conclusion that the land was an 'estate' and that the defendants were ryots; and he drew the conclusion that in spite of the fact that the Civil Court had jurisdiction when the suit was filed, it ceased to have jurisdiction after the Act was passed. He therefore ordered the lower Court to return the plaint for re-presentation to the Revenue Court. Although I may not be strictly bound by the conclusions in either of these cases, they are given in carefully considered judgments which I respectfully prefer to follow. In the present case the lower Court therefore ceased to have jurisdiction after the passing of the Act; and when the attention of the Court was drawn to the fact that it had no jurisdiction, it was bound to stop the case and return the plaint.

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The petitioners have however been guilty of laches and much of the expenses of this litigation has been due to them. When the prior earlier Revision Petition was filed, no objection was taken on the ground of want of jurisdiction, although the Revision Petition was heard and decided after the Act was passed. In allowing this petition, therefore, I order that the petitioners should pay the costs of the suit incurred in the lower Court up to date and the costs of the prior Civil Revision Petition. There will be no order as to costs in this Court. The decree of the lower Court is set aside and the lower Court ordered to return the plaint to the respondent for presentation to a Revenue Court.

K. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Narayanaswami Naidu and another .. *Petitioners** (*Petitioners*)

v.

Rajamanickam Pillai .. *Respondent* (*Respondent*).

Narayanaswami Naidu v. Rajamanickam Pillai.

Agriculturists' Relief Act (IV of 1938), Ss. 8 and 9—Compromise decree—Payment of money in part discharge of debt—Appropriation first towards interest and costs and balance towards principal—Appropriation whether permissible.

1. (1937) 2 M.L.J. 573.

* C. R. P. No. 1216 of 1939. 20th October, 1939.

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Where a final decree on a compromise was passed on 14th August, 1937, and three days later, that is, on 17th August, 1937, the petitioner paid a certain amount in part discharge of the debt and the respondent filed an execution petition on 14th December, 1937, in which he stated that he had appropriated the amount paid first towards interest and costs and the balance only towards principal, on an application for scaling down the debt under S. 8 of the Act IV of 1938 the only question that arose being whether the respondent could be allowed to appropriate the sum first towards costs and interest,

Held, that he could appropriate it in the manner he did.

It would be contrary to the spirit of the Act and even to the literal meaning of sections 8 and 9 of the Act, to hold that for purposes of the Act the debt was incurred after the 1st of October, 1932.

Decision of Pandrang Row, J., in C.R.P. No. 86 of 1939, referred to.

Petition under S. 115 of Act V of 1908 and S. 224 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Mayavaram dated 20th January, 1939 and made in A. S. No. 72 of 1938 preferred against the order of the Court of the District Munsif of Shiyali dated 30th July, 1938 and made in I. A. No. 261 of 1938 in O. S. No. 65 of 1936.

Ch. Raghava Rao and *S. Rajaraman* for Petitioners.

M. S. Venkatarama Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The respondent brought a suit on a mortgage bond against the petitioner; and a compromise decree was obtained on 17th October, 1936. A final decree was passed on 14th August, 1937 and three days later, on 17th August, 1937, the petitioner paid Rs. 1,400 in part discharge of the debt. On 14th December, 1937, the respondent filed E. P. No. 77 of 1938 in which he stated that he had appropriated Rs. 1,400 first towards interest and costs and the balance towards principal. The petitioner has since put in an application to scale down the debt under S. 8 of the Madras Act IV of 1938; and the only question that arises in this petition is whether the respondent can be allowed to appropriate that sum of Rs. 1,400 first towards costs and interest and afterwards towards principal. Both the Courts below have held that he could.

The argument of the petitioner is that the appropriation took place only on 14th December, 1937, the date on which E. P. No. 77 of 1938 was filed; but it does not follow that because that was the first mention of the appropriation, it took place only on that date. The payment of Rs. 1,400 was presumably immediately applied in reduction of the debt. It is not as if

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(taking the figures in paragraph 7 of the first Court's judgment) that Rs. 2,139-15-5 remained outstanding after the date of payment and on the other side there was a credit of Rs. 1,400. That payment of Rs. 1,400 was not carried on in ***anamath*** to be credited at some future date: the money was at once applied to the reduction of the debt. So, it cannot be said that the interest due on 17th August, 1937, remained outstanding after the payment was made. In a Privy Council case (*Luchmeswar Sing Bahadur* v. *Syad Lutf Ali Khan*[1]) it was held that if the debtor did not himself make a specific appropriation when he made the payment, the creditor had a right to consider it as a payment towards interest. So that on the date of the payment it must be deemed to have gone in discharge firstly of interest and secondly of principal.

Mr. Raghava Rao has put forward a rather ingenious alternative argument that we must consider the debt to have arisen on 17th October, 1936, the date of the compromise decree, so that it is S. 9 of the Act and not S. 8, that has to be applied. It seems clear that the Legislature intended to draw a definite distinction between the treatment of debts that first arose before the 1st of October, 1932 and those that arose after that date; and although in some ways the compromise decree may be considered to have given rise to a new debt, yet I think it would be contrary to the spirit of the Act and even to the literal meaning of these two sections to interpret this as meaning that, for purposes of Ss. 8 and 9, the debt was incurred after the 1st of October, 1932. The decision of Pandrang Row, J., in C. R. P. No. 86 of 1939 is quoted as an authority for the contention that a debt was incurred on the date of the compromise decree; but I do not find that Pandrang Row, J., went so far. There seems to have been an argument before him in which an attempt was made to split up the compromise decree and to say that a certain part must be deemed to be interest and a certain part principal. Pandrang Row, J., repelled that argument and held that a compromise decree must be taken as a whole, that it is not permissible to split up a compromise decree in the manner suggested, and that the amount due under the compromise decree must be taken as principal.

I agree with the finding of the Courts below and accordingly dismiss this petition with costs.

K. C. ——— *Petition dismissed.*

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1. (1871) 8 Beng.L.R. 110 (P.C.).

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

P. R. S. A. R. Periakaruppan Chettiar .. *Petitioner* (Petitioner)*

v.

P. S. A. R. A. R. Arunachalam Chettiar and others .. *Respondents (Nil, Respondents and Nil).*

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Periakaruppan Chettiar *v.* Arunachalam Chettiar.

Provincial Insolvency Act (V of 1920), S. 35—Adjudication based on alleged fraudulent preference of one creditor—Finding in proceedings under S. 54 of the Provincial Insolvency Act, that there was no preference—Annulment of adjudication under S. 35—Jurisdiction to make—Failure of debtor to object to adjudication—If bar to application for annulment—S. 37—Disposal of assets realised on annulment.

When it is shown that no act of insolvency has in fact been committed the Court can set aside the adjudication on the ground that the debtor ought not to have been adjudged insolvent. The fact that the debtor does not object to an order of adjudication being passed against him is no bar to granting of an application for an order setting aside the adjudication under the provisions of S. 35. When an adjudication has taken place under the Provincial Insolvency Act and it has been shown that no act of insolvency has been committed the Court has no discretion in the matter. It must annul the adjudication. The word used is "shall" and differs from S. 21 of the Presidency Towns Insolvency Act where the word 'may' is used.

Gopu Chinna Jogayya v. *Mamidi Satyanarayana*, (1939) 2 M.L.J. 753, overruled.

[Under the powers under S. 37 money fraudulently paid by the debtor after his adjudication but before annulment to an individual having been found to be the result of a fraud was allowed to be distributed rateably between the creditors who had proved in the insolvency. The other assets realised were directed to be delivered to the debtors.]

Petitions under S. 75 of Act V of 1920, praying the High Court to revise the decree of the District Court of Coimbatore in C. M. A. No. 126 of 1935, preferred against the order of the Court of the Principal Subordinate Judge of Coimbatore dated 30th March, 1935 and made in I. A. No. 343 of 1935 in I. P. No. 242 of 1927.

K. Rajah Aiyar and *M. Krishna Bharathi* for Petitioner in C. R. P. Nos. 572 and 573, *S. Ramachandra Aiyar* for C. R. P. Nos. 720 and 721, *T. M. Krishnaswami Aiyar* and *N. Siva-*

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* C. R. Ps. Nos. 572, 573. 720, 721, 1005 and 1006 of 1936. 15th November, 1939.

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ramakrishna Aiyar for Petitioner in C. R. P. Nos. 1005 and 1006 of 1936.

T. M. Krishnaswami Aiyar, N. Sivaramakrishna Aiyar, K. Kuttikrishna Menon and *P. Anandan Nair* for Respondents in C. R. P. Nos. 572 and 573, *N. Sivaramakrishna Aiyar, A. C. Sampath Aiyangar, K. Kuttikrishna Menon* and *P. Anandan Nair* for Respondents in C. R. P. No. 720, *N. Sivaramakrishna Aiyar, K. Kuttikrishna Menon* and *P. Anandan Nair* for C. R. P. No. 721, *S. Ramachandra Aiyar, K. Kuttikrishna Menon* and *P. Anandan Nair* for Respondents in C. R. P. Nos. 1005 and 1006 of 1936.

The judgment of the Court was delivered by

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The Chief Justice.—These six Civil Revision Petitions deal with three different matters arising out of the adjudication in insolvency of one Palani Goundan and his son Kandaswami Goundan by the Subordinate Judge of Coimbatore, but they may all be conveniently dealt with in one judgment. The order of adjudication was passed on the 26th September, 1928, on a petition filed by P. S. A. R. A. R. Arunachalam Chettiar who alleged that the insolvents had fraudulently preferred another Chettiar, Somasundaram by name, by executing in his favour on the 2nd June, 1927, a mortgage of immovable property. The insolvents did not enter an appearance and the order of adjudication was passed without opposition. On the 14th October, 1929, the petitioning creditor applied to the Court for an order under the provisions of S. 54 of the Provincial Insolvency Act setting aside the mortgage in favour of Somasundaram. The Subordinate Judge held that the fraudulent preference alleged had been established and set aside the transaction. An appeal followed to the District Judge of Coimbatore, who allowed it. The petitioning creditor then asked this Court to restore the order of the Subordinate Judge in the exercise of its revisional powers. This Court, however, agreed with the District Judge that there was no fraudulent preference and consequently refused to interfere with his order. On the 25th March, 1935, as the result of this Court's decision the insolvents applied to the Subordinate Judge for the annulment of the adjudication and a similar application was filed by a creditor, P. R. S. A. R. Periakaruppan Chettiar. These petitions were allowed and the adjudication was set aside under the provisions of S. 35 of the Act. On appeal the District Judge reversed this decision and

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three of the petitions now before the Court, namely, Nos. 572, 720 and 721, ask this Court to revise the District Judge's order.

S. 35 of the Provincial Insolvency Act says that where in the opinion of the Court a debtor ought not to have been adjudged insolvent the Court shall, on the application of the debtor, or of any other person interested, by order in writing, annul the adjudication. The Subordinate Judge held that the Court had an unrestricted power to set aside the adjudication where it was established that the order of adjudication ought not to have been passed. The District Judge considered that the power of the Court was restricted to a case where it could be shown that on the materials before it at the time of the adjudication the order ought not to have been passed. Although at a later stage it becomes apparent that the order of adjudication would not have been passed if the Court had been in possession of the whole of the facts the Court has, in the opinion of the District Judge, no power to set aside the adjudication.

The section contains no restriction on the power of the Court to set aside the adjudication where it is shown that the debtor ought not to have been adjudged insolvent. The District Judge has read something in the section, which is not there and moreover his decision is opposed to principle. In the words of James, L. J., in Ex parte *Learoyd*: In re *Foulds*[1]:

"A man cannot be 'duly' adjudged a bankrupt, unless the great requisite of all exists, that he has committed an act of bankruptcy. That is the capital offence of which he must have been guilty before he can be 'duly' adjudged a bankrupt."

If no act of insolvency has been committed the estate cannot be administered under the provisions of the Provincial Insolvency Act and S. 35 has been inserted in the Act to give the Court power to set aside an adjudication which ought not to have been made. S. 35 of the Provincial Insolvency Act corresponds to S. 35 of the Bankruptcy Act of 1883. In In re *Hester*: Ex parte *Hester*[2], a case which was decided under the Bankruptcy Act of 1883, Charles, J., said:—

"Is it a case in which, if he had been adjudged a bankrupt, the Court would say that he ought not to have been so adjudged? These words are undoubtedly very wide, and many grounds can be conceived upon which the Court might come to the conclusion that a debtor ought not to have been adjudged bankrupt. For example, if there was no sufficient petitioning creditor's debt, or no act of bankruptcy, or if it turned out that the adjudication had been obtained for some sinister purpose, that is, some purpose

1. (1878) 10 Ch. D. 3. 2. (1889) 22 Q.B.D. 632.

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foreign to the administration of bankruptcy law; all these are grounds on which the Court might be of opinion that the debtor ought not to have been adjudged bankrupt."

There is here express authority for the statement that where it is shown that no act of insolvency has in fact been committed the Court can set the adjudication aside on the ground that the debtor "ought not to have been adjudged insolvent."

In the Bankruptcy Act of 1869 which remained in force until the Bankruptcy Act of 1883 was passed there was no corresponding section to S. 35, but the Court of Appeal held that in a proper case the Court had power to annul an adjudication, see Ex parte *Geisel*: In re *Stanger*1. In that case the petitioning creditor alleged that his debtor had committed an act of bankruptcy by departing from his dwelling house with intent to defeat and delay his creditors. He had failed to show that the debtor was alive in some other place at the time. An order of adjudication was passed, but it was set aside by the Court of Appeal on the ground that the Court was not satisfied that the man was alive at the time. Probate had in fact been granted of the alleged bankrupt's will.

The fact that a debtor does not object to an order of adjudication being passed against him is no bar to the granting of an application for an order setting aside the adjudication under the provisions of S. 35. In Re *Helsby*2, a married woman was adjudged bankrupt on the ground that she was carrying on a business of her own with her capital. She offered no opposition when the adjudication was made and she allowed it to stand until criminal proceedings for alleged offences against the bankruptcy law had been instituted against her and other members of her family. She then applied to have the adjudication set aside and it was held by the Divisional Court that she was entitled to the order asked for because it had become apparent that she was not carrying on a business of her own with her own capital.

In support of his contention that the order of the District Judge is right, Mr. T. M. Krishnaswami Aiyar has quoted to us two cases, Ex parte *French*: Re *Trim*3 and *Gopu Chinna Jogayya* v. *Mamidi Satyanarayana*4. In the first of these cases, a trader

1. (1882) 22 Ch. D. 436.
2. (1893) 69 L.T. 864.
3. (1882) 47 L.T. 339.
4. (1939) 2 M.L.J. 753.

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having committed an act of bankruptcy, a petition was presented against him by two creditors and an adjudication followed. Subsequently, the debtor moved the Court to annul the adjudication on the ground of the insufficiency of the petitioning creditors' debt. Bacon, C.J., held that the debtor ought to have appealed against the order of adjudication within the 21 days limited for that purpose, and that not having done so, the publication in the Gazette, was, under S. 10 of the Bankruptcy Act, 1869, conclusive evidence of the validity of the adjudication. The fact that the petitioning creditors' debt was not of the amount on which a petition could be based was not a sufficient reason for the annulment of the adjudication. The judgment in this case was delivered on the 13th November, 1882, four days before the judgment of the Court of Appeal in Ex parte *Geisel*: In re *Stanger*[1], where it was held that S. 10 of the Bankruptcy Act, 1869, had no application and an adjudication could be annulled even after the time for appealing had elapsed. Therefore Ex parte *French*: Re *Trim*[2] must be taken to have been overruled. It certainly has no application in the case before us.

In *Gopu Chinna Jogayya* v. *Mamidi Satyanarayana*[3], a creditor applied to have an order of adjudication annulled on the ground that the petitioning creditor's debt was a bogus one. Kunhi Raman, J., said that there was no doubt that but for the petition the adjudication would not have taken place but he added:

> "Once an adjudication takes place all the other creditors of the debtor become interested in the matter and unless the appellant here is able to show that the debtor did not owe any other debts or that the debtor was not really insolvent at the time the order of adjudication was made by the lower Court, it is not open to him to contend that it is a case in which the order of adjudication ought not to have been made."

These observations cannot be accepted as a correct statement of the law. When an adjudication has taken place under the Provincial Insolvency Act and it has been shown that no act of insolvency has been committed the Court has no discretion in the matter. It must annul the adjudication. The word used is "shall" and the section in this respect differs from

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1. (1882) 22 Ch. D. 436.
2. (1882) 47 L.T. 339.
3. (1939) 2 M.L.J. 753.

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S. 21 of the Presidency Towns Insolvency Act where the word 'may' is used.

In the present case the judgment of this Court upholding the decision of the District Judge that there was no fraudulent preference is conclusive on the question whether an act of insolvency had taken place. The decision was that there had been no fraudulent preference and this decision is binding on all, the insolvent, the creditors, and the mortgagee. As there was no act of insolvency the Court is bound to annul the adjudication. Therefore the order of the District Judge will be discharged and the order of the Subordinate Judge restored with costs in favour of the petitioners in petitions Nos. 572, 720 and 721 of 1936 (one set throughout). The costs will be paid by the petitioning creditor.

Civil Revision Petition No. 573 of 1936 arises out of an application filed by the Official Receiver in these circumstances. After the adjudication but before its annulment, the insolvent paid to P. R. S. A. R. Periakaruppan Chettiar a total sum of Rs. 3,600. There were five payments altogether and were made between the 9th September, 1928 and 22nd September, 1931. There is no doubt here that the insolvents and Periakaruppan Chettiar were parties to a gross fraud. The Official Receiver applied to the Court to direct Periakaruppan Chettiar to refund a sum of Rs. 2,700 which the Official Receiver understood was the total amount which had been paid by the insolvents to this creditor. The Subordinate Judge held that the creditor had received only Rs. 1,200 during the period of adjudication, but as the order of adjudication had been annulled, he dismissed the Official Receiver's petition. An appeal followed to the District Judge, who held that Periakaruppan Chettiar had in fact received Rs. 3,600 and directed him to pay it over to the Official Receiver, which he did. It is common ground that the total amount received by Periakaruppan Chettiar was the Rs. 3,600 found by the District Judge. Periakaruppan Chettiar now asks this Court to revise the order of the District Judge and direct that the money be paid over to him. S. 37 (1) of the Provincial Insolvency Act reads as follows:—

"Where an adjudication is annulled, all sales and disposition of property and payments duly made, and all acts therefore done, by the Court or receiver shall be valid; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint or in default of any such appointment, shall revert to the debtor to the extent of

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his interest therein on such conditions (if any) as the Court may, by order in writing, declare."

In *Veerayya* v. *Srinivasa Rao*[1], a Full Bench of this Court held that under this section the Insolvency Court retains full power to give directions as to the realization and disposal of the debtor's assets. The power ought not to be used arbitrarily but used in the interests of the general body of creditors, which meant that the proper order for the Court to pass was that the appointee should continue to realize and distribute the debtor's property in accordance with the provisions of the Act. The person appointed had not all the statutory powers of an Official Receiver but only such powers as the Court conferred upon him.

S. 37 gives the Court a wide discretion. The annulment of the adjudication does not mean that the debtor who is adjudicated is necessarily to be placed in possession of the property which is in the hands of the Official Receiver at the time the adjudication is set aside. The directions of the Court must depend on the circumstances in each case. In this case it would not be proper to allow Periakaruppan Chettiar, who has been guilty of a gross fraud on the Court and on his fellow creditors, to enjoy the fruits of his fraud. When the money was in his hands it was not his. It was money which was vested in the Official Receiver and he only got possession of it as the result of the fraud. When the adjudication was set aside the Official Receiver was not as such entitled to the money. It then belonged to the insolvents, as Mr. Rajah Aiyar concedes. The money is now in the hands of the Official Receiver and is still the property of the debtors. In view of their participation in the fraud we consider that it would also be improper to direct the Official Receiver to pay it over to them. We are of the opinion that the proper course in the circumstances of this case is to direct that the money be vested in the Official Receiver, not as Official Receiver, but as a person appointed by the Court under the section, and we direct accordingly. The Official Receiver will in due course take steps to distribute the Rs. 3,600 rateably amongst the creditors who have proved in the insolvency proceedings. He will be entitled to the usual commission and charges. This petition has been opposed by the petitioning creditor and the Official Receiver. They are entitled to their costs (one set throughout).

1. (1935) 69 M.L.J. 364: I.L.R. 58 Mad. 908 (F.B.).

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The remaining petitions are Nos. 1005 and 1006. The petitioning creditor here asks that certain other assets in the hands of the Official Receiver should be distributed by him amongst the creditors. There are no special circumstances which justify an order of this nature. The Official Receiver will be directed to deliver the assets, other than the Rs. 3,600, to the debtors two months hence. The properties will be handed over to them then, subject, of course, to any order of the Court which may be passed in the meantime. There will be no order as to costs in these petitions.

The Official Receiver will be allowed one set of costs out of the estate throughout in respect of petitions Nos. 572, 720 and 721, and one set in petitions Nos. 1005 and 1006.

Petitions Nos. 572, 573, 720 and 721 of 1936 allowed.
Petitions Nos. 1005 and 1006 of 1936 dismissed.

K. S.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE SOMAYYA.

Paladugu Veera Ramachandra Rao.. *Appellant* (3rd (Defendant)*

v.

Paladugu Parasuramayya and another .. *Respondents (Plaintiff and 2nd Defendant).*

F.B.

Ramachandra Rao *v.* Parasuramayya

Civil Procedure Code (V of 1908), S. 48—Time-barred decree—Amendment under S. 152 in conformity with judgment—Effect on limitation—Limitation Act, Art. 182—If applicable.

There can be no execution of a decree governed by S. 48 of the Civil Procedure Code when twelve years have passed from the date of the decree, amendment or no amendment. A correction under S. 152, Civil Procedure Code, made in a time-barred decree still leaves the decree time barred and does not have the effect of starting a fresh period of limitation. Art. 182 of the Limitation Act clearly leaves the provisions of S. 48, C.P.C., untouched.

Decision of Madhavan Nair and Cornish, JJ., in C. M.A. No. 264 of 1931 (unreported), overruled.

Faqir Chand v. *Kundan Singh*, (1932) I.L.R. 54 All. 622, approved.

Narsingrao Konher Inamdar v. *Bando Krishna Kulkarni*, (1918) I.L.R. 42 Bom. 309; *Ganesh Das* v. *Vishan Das*, A.I.R. 1935 Lah. 292 and *Musammat Dulhin* v. *Mahanth Harihar Gir*, (1939) I.L.R. 18 Pat. 395, referred to.

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* A. A. A. O. No. 135 of 1937. 3rd November, 1939.

F.B.

Rama-chandra Rao v. Parasu-ramayya.

Appeal against the order of the District Court of Guntur dated 9th February, 1936, and made in Appeal No. 33 of 1936 preferred against the order of the Court of the Subordinate Judge of Guntur in E. P. No. 443 of 1935 in O. S. No. 17 of 1921.

P. Satyanarayana Rao for Appellant.

A. Lakshmayya for Respondents.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—This appeal raises a question of limitation. On the 9th March, 1922, the first respondent obtained in the Court of the Subordinate Judge of Bezwada a money decree against the appellant, the appellant's uncle and a cousin, who were the members of an undivided family. The amount for which judgment was obtained was Rs. 3,735, but a mistake was made in drawing up the decree and the figure inserted was Rs. 2,200. It was not until the 16th July, 1928, that the mistake was corrected under the provisions of S. 152 of the Code of Civil Procedure. On the 6th December, 1933, the respondent caused the decree to be transferred to the Court of the Subordinate Judge of Guntur for execution and on the 5th March, 1934, he applied for attachment of certain immovable property. The appellant objected to the attachment on the ground that the property was his personal property and the decree had only made him liable to the extent of his interest in the family property. This objection was well founded and the attachment was raised. On the 12th November, 1935, the respondent filed another application for execution. Here he asked for the attachment of two decrees, one obtained by the appellant alone and the other in conjunction with his cousin. It was contended that the application was barred by the law of limitation and the contention was upheld by the Subordinate Judge. An appeal followed to the District Judge of Guntur who held that the decree was barred so far as it related to the sum of Rs. 2,200 but it was enforceable to the extent of Rs. 1,535, the difference between the Rs. 2,200 and Rs. 3,735, the figure which was inserted in the decree as the result of the amendment.

It is obvious that the District Judge's decision was wrong in allowing execution of part of the decree. The respondent must be entitled to the full amount, if entitled to anything. When the provisions of S. 48 of the Code of Civil Procedure

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and Art. 182 of the Limitation Act are considered it however becomes manifest that the Subordinate Judge was right in holding that the decree was time barred.

S. 48 (1) of the Code of Civil Procedure reads as follows:—

"Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from—

(a) the date of the decree sought to be executed, or

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree."

Therefore a decree which has been passed for more than twelve years cannot be executed, but where the decree or an order passed subsequent to the decree directs payment of money or the delivery of property to be made at a certain date or at recurring periods the date of the default in such a case shall be the starting point for the period of twelve years. O. 20, r. 7 provides that the decree shall bear the date of the judgment.

Sub-S. (2) of S. 48 says:

"Nothing in this section shall be deemed—

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application; or

(b) to limit or otherwise affect the operation of Art. 180 of the second Schedule to the Indian Limitation Act, 1877."

The corresponding article in the present Limitation Act is Art. 182. Now, turning to clause (4) of that article we find that the period of limitation where a decree has been amended is three years from the date of the amendment, but the article is expressly limited to applications for execution not provided for by Art. 183 or by S. 48 of the Code of Civil Procedure. Art. 183 refers to applications to enforce judgments of High Courts and it has no bearing here. Inasmuch as Art. 182 clearly leaves the provisions of S. 48 untouched there can be no execution of a decree governed by S. 48 when twelve years have passed from the date of the decree, amendment or no amendment. It is true that there is no period of limitation for an amendment of a decree to correct an

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accidental slip or omission under S. 152 of the Code. But because the Code gives the Court power to correct slips or omissions at any time it does not mean that the law of limitation is affected. A correction made in a time-barred decree leaves the decree still time-barred.

The question under consideration has been the subject of decisions by the Bombay, Allahabad, Lahore and Patna High Courts and they have all agreed that an amendment of a decree to bring it in accordance with the judgment does not have the effect of starting a fresh period of limitation. (See *Narsingrao Konher Inamdar* v. *Bando Krishna Kulkarni*[1], *Faqir Chand* v. *Kundan Singh*[2], *Ganesh Das* v. *Vishan Das*[3] and *Musammat Dulhin* v. *Mahanth Harihar Gir*[4].) In *Faqir Chand* v. *Kundan Singh*[2], the Allahabad High Court observed:—

> "Now no change was made in S. 48 of the Code of Civil Procedure providing for the extension of the period of twelve years in that section from the date of the amendment of a decree. We consider that the legislature advisedly omitted that provision for extension from S. 48; and that the omission was not accidental. In our opinion the effect of the omission is that an amendment of a decree does not give a new date for starting a period of limitation, if the application for execution is beyond the period of twelve years allowed by S. 48; that is the period of twelve years under S. 48 is final and cannot be extended by any amendment of the decree, whether that amendment is made before the expiry of the period of twelve years or whether that amendment is made after the expiry of the period of twelve years. The reason why no amendment was made in S. 48 is that probably the greater period of twelve years is allowed by that section, and it is probably the intention of the legislature that that period of twelve years should be final, and that within that period a decree holder should amend his decree and obtain all consequent remedies. If a decree-holder neglects to amend his decree within a sufficient period before the expiry of twelve years to allow him to obtain his remedy by execution, then he has only himself to blame."

I agree entirely with what is said here.

In an unreported case of this Court (C.M.A. No. 264 of 1931) Madhavan Nair and Cornish, JJ., without giving any reasons, held that the period of limitation should be calculated from the date of the amendment of the decree. As their decision runs contrary to the plain wording of S. 48 of the Code of Civil Procedure and Art. 182 of the Limitation Act it cannot be allowed to stand.

The learned Advocate for the respondent has argued that S. 48 of the Code of Civil Procedure is not in all cases final

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1. (1918) I.L.R. 42 Bom. 309.
2. (1932) I.L.R. 54 All. 622.
3. A.I.R. 1935 Lah. 292.
4. (1939) I.L.R. 18 Pat. 395.

and has drawn attention to the provisions of S. 15 of the Limitation Act, but all that need be said is that S. 48 is final unless there is some statutory provision which governs it in a particular case, and that is not the position here. S. 48 applies in the present case and as more than twelve years had elapsed before the last application for execution was made the decree had become time barred.

The appeal will be allowed and the judgment of the Subordinate Judge restored. The appellant is entitled to his costs in this Court and in the District Court. A memorandum of cross-objections filed by the respondent does not call for consideration and will be dismissed without costs.

Krishnaswamy Aiyangar, J.—I am of the same opinion. Indeed there is no escape from it when the language of S. 48 of the Code of Civil Procedure is read in the light of the provisions of Art. 182 of the Indian Limitation Act. The words used in the first column of that article make it clear that the Legislature did not intend to interfere in any way with the limit of time fixed by S. 48. The Code of Civil Procedure and the Limitation Act were enacted at the same time and a comparison of the provisions of the two statutes makes it abundantly clear that there is an intimate relationship between the two. In the Limitation Act of 1908 a new provision was inserted to fix the point of time from which the period of limitation under Art. 182 has to be calculated where the decree is amended; clause (4) was added to the article, so as to make it clear in such a case that it is the date of the amendment from which limitation will run. While the case of an amendment is thus met and provided for by Art. 182 of the Limitation Act it is significant that the language of S. 48 of the Code of Civil Procedure has been left unaltered. It is therefore a fair inference that the period of twelve years should be counted from the date of the decree irrespective of any amendment that it might have undergone since. The date of the amendment does not therefore furnish a fresh starting point under S. 48 of the Code of Civil Procedure and must accordingly be ignored in making the calculation.

It was suggested on behalf of the respondent that the fact that there is no period of time limited for an application for an amendment under S. 152 introduces an anomaly. It was said

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that a Court may grant and may be obliged to grant an amendment even after the period of twelve years fixed by S. 48 of the Code of Civil Procedure and where an amendment is so granted the order would be rendered futile and barren unless S. 48 is understood as permitting the twelve years' period to be calculated from the date of the amendment. This may be an anamoly but the remedy is in the hands of the Legislature. When the language of the statute is clear we cannot refuse to give effect to it on a consideration of this kind.

Somayya, J.

Somayya, J.—I agree with my Lord the Chief Justice.

K.S. *Appeal allowed and memorandum of cross-objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Sornammal .. *Appellant** (*Plaintiff*)

v.

Thangavelu Mudaliar and others .. *Respondents* (*Defendants*).

Sornammal v. Thangavelu Mudaliar.

Civil Procedure Code (V of 1908), O. 1, r. 9—Suit on mortgage by one of two joint tenants—If suit maintainable and if decree can be passed in the absence of the other—Death of the other pending suit and plaintiff becoming solely entitled—If decree for whole amount can be passed.

Where one of the two daughters (joint tenants) and heirs of a deceased mortgagee sued on the mortgage, objection was taken that she was not entitled to sue solely and exclusively on the mortgage bond. Pending the suit the other daughter died.

Held, the provisions contained in O. 1, r. 9 are clear enough and make it incumbent on the Court to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. In exceptional cases Court would refrain from passing a decree in favour of a plaintiff when it finds that all the parties interested in the subject-matter of the suit have not been impleaded. But because of the death of the sister pending suit, plaintiff was the only person entitled to recover the whole amount at the time of passing the decree, a decree for the full amount ought to be passed as the Court was justified in taking notice of subsequent events (death of sister). (A compromise in a partition suit by which the other sister authorised the plaintiff to sue for the whole amount was also found valid.)

Appeal against the decree of the District Court of East Tanjore at Negapatam in A. S. No. 128 of 1933 preferred against the decree of the Court of the District Munsif of Mayavaram in O. S. No. 281 of 1932.

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* S. A. No. 250 of 1936. 18th August, 1939.

Sornammal v. Thangavelu Mudaliar.

K. Rajah Aiyar, Arumugam and *Arunachalam* for Appellant.

T. V. Muthukrishna Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The facts out of which this appeal has arisen are not in dispute and lie in a narrow compass. A mortgage was executed on the 24th April, 1915, by one Kandaswamy, father of defendants 1 and 2 in favour of Muthukumaraswami Pillai who died in 1918 leaving him surviving a widow and two daughters. The widow appears to have died shortly after her husband and we are not concerned with her in the present litigation. The money due under the mortgage was not paid and one of Muthukumaraswami's daughters brought the present suit in June, 1932, for the sale of mortgaged property but she did not implead the other daughter as a party. This led the third defendant, who had purchased the mortgaged property from Kandaswamy and undertaken to discharge the mortgage debt, to raise the objection that the plaintiff was "not entitled solely and exclusively to sue on the mortgage bond." Various other defences were also raised by the third defendant and his minor son the fourth defendant; but they were decided against them. The plea that the plaintiff was not entitled to sue alone was overruled by the trial Court but was upheld in appeal by the learned District Judge of East Tanjore and the suit was ordered to be dismissed. The plaintiff consequently appeals and the only question to be determined is whether the plaintiff was entitled to sue alone on the basis of the mortgage deed executed in her father's favour or rather whether the decree passed in her favour by the trial Court had been wrongly set aside by the lower appellate Court. It might be stated here that the second daughter of Muthukumaraswami died during the pendency of the suit and it was not disputed that the two daughters of Muthukumaraswamy had taken their father's property as joint tenants with rights of survivorship although their interests were limited to their lives only.

The determination of the question whether the plaintiff was entitled to sue depends mainly on a compromise arrived between her and her sister on the 8th October, 1930, in a suit for partition instituted by the latter in the Court of the District Munsif of Mayavaram (O. S. No. 5 of 1930) and embodied in a decree

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(Exhibit D). The lower appellate Court was of opinion that the decree embodying the compromise was inadmissible in evidence for want of registration as the mortgage in suit had not formed the subject-matter of that litigation and did not therefore fall within the category of decrees which were exempt from registration. This decision has been challenged on three or four grounds:—firstly that the suit (O. S. No. 5 of 1930) was for general partition and the mortgage-deed must be, in the absence of any evidence to the contrary, presumed to have formed the subject-matter of that suit; secondly, because no rights in the mortgage were created in the plaintiff for the first time and the decree or the compromise on which the decree was based only recorded or recited an event which had happened in the past. Mr. Raja Aiyar has, in the alternative, submitted that even if the decree were held to be inadmissible in evidence, the decree passed by the trial Court should not have been set aside as the event of the plaintiff's sister's death which occurred during the pendency of the suit could not have been ignored and the plaintiff's capacity to sue, even if defective at the time when the suit was instituted, could not be held to have remained so at the time when the suit came up for trial. In the end it was urged that the suit could not have been dismissed for non-joinder of the plaintiff's sister and it was incumbent on the lower appellate Court to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. Mr. Ramaswami Aiyar on the other hand contends that in the face of a concurrent finding by both the lower Courts to the effect that the mortgage did not form the subject-matter of the suit for partition, it would not be possible for this Court to hold otherwise. He also contended that cl. 7 of the decree could not be construed so as to contain a record merely of a past event. The present suit was not, according to him, dismissed on account of non-joinder but really on a question of limitation as it was instituted shortly before the expiry of the period of limitation provided for such suits and would have met the same fate even if the plaintiff's sister had remained alive. He also submitted that the plaintiff's status on the date of the suit could not be improved by the sister's subsequent death and it is only with the date on which the suit was instituted that we are now concerned.

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In order to appreciate the various contentions raised by the parties it would be better to have a clear idea as to what this clause in the decree actually stated. It reads as follows:—

"As regards the recovery by the deed for Rs. 1,500, executed on 24th April, 1915, by Kandaswami Mudaliar in favour of the said Muthukumaraswami Pillai as aforesaid, the *plaintiff has no objection* whatsoever."

Learned Counsel for the respondent contends that the translation printed on the record is not quite correct and suggests it should have been as follows:—

"The plaintiff has no objection to the first defendant solely collecting the mortgage deed dated 24th April, 1915, executed in favour of the aforesaid Muthukumaraswami Pillai by Kandaswami Mudaliar for Rs. 1,500."

It would be quite sufficient for the purpose of this appeal to accept the translation given by Mr. Ramaswami Aiyar and proceed to examine the clause on that basis. A careful reading of this document would show that whatever the arrangement between the parties might have been and without going into the question whether it did or did not form the subject-matter of the partition suit, the words only convey the idea that the plaintiff's sister had no objection to the plaintiff collecting the amount of the mortgage in suit herself. In other words they amount really to a consent or authority given by her sister to the plaintiff to recover the mortgage amount. Cl. 7 of the decree is preceded by another clause in which the plaintiff had given a similar authority in almost identical words to her sister in regard to another mortgage, although it was for a much smaller amount. It is true that the plaintiff has in paragraph 5 of her plaint alleged that her sister had renounced her claim to this mortgage "by virtue of the decree in O. S. No. 5 of 1930", but are the Courts bound as seems to have been stated by the Courts below, to hold a document to be inadmissible in evidence only because a party has tried to put an interpretation on it, although favourable to himself or herself, which is not borne out by its words and when the Court finds that interpretation to be wrong and the document admissible in evidence on a correct interpretation? I am of opinion that the interpretation placed by a party on the document would not prevent the Court from coming to another conclusion and giving effect to the finding to which it may arrive. But since in view of certain observations made by me in Court when the case was being argued this question was not fully discussed by Mr. Rajah Aiyar and the learned Counsel for the respondent did not apparently for the same

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reason think it necessary to refer to it in his reply. I have decided not to pursue this part of the matter any further and would refrain from expressing any opinion on it.

This brings me to the first contention raised by Mr. Rajah Aiyar. He contends that it has not been proved on the record that the mortgage in suit was not included in the suit for partition or in other words that it had not formed the subject-matter of that suit, and since it was for the defendant, who had raised the objection to show that the mortgage in suit had not formed the subject-matter of that suit, he ought to be, in the absence of any evidence on the record, held to have failed to establish his objection. He also complains that the pleas raised by the third defendant in paragraphs 12 and 13 and on behalf of the fourth defendant in paragraphs 7 and 9 of their written statements were vague and they should not have been allowed to take the objection as to the inadmissibility of the decree for want of registration in the lower appellate Court. I do not feel impressed however by this complaint. The objection that the plaintiff was not entitled to sue alone was specifically raised by the third defendant and it was unnecessary for either of these defendants to anticipate, even if they are supposed to have knowledge of the fact, the line of action to be adopted by the plaintiff in maintaining her *locus standi* to bring or continue the suit. It was incumbent on the plaintiff to show how she was entitled to sue in spite of the right having devolved on her and her sister jointly. Once she succeeded in showing consent or authority or any other fact which would entitle her to bring the action alone, the onus would shift to the other side to rebut the evidence adduced on behalf of the plaintiff. By producing the decree in the partition suit, the plaintiff had at least *prima facie* discharged the onus, and it was thus for the defendant to show that the decree was inadmissible in evidence for want of registration when we find that ordinarily all decrees or orders passed by Courts are stated in S. 17 (2) (*vi*) to be exempt from registration. The learned Counsel for the respondent urges that the respondent has succeeded in establishing that the mortgage in suit did not form the subject-matter of the partition suit and tried to take shelter under what he calls a concurrent finding of both the lower Courts. I have gone through paragraphs 14 to 15 of the trial Court's judgment and paragraphs 3 to 7 of the lower appellate Court's judgment and am of the view that although there is

a reference to this question in paragraph 14 of the trial Court's judgment, yet I cannot say if there is a definite finding on that point in favour of the respondent. Nor can I trace a finding on this question in the judgment of the lower appellate Court. My attention has been drawn however by the learned Counsel for the respondent to the decree and to the schedules which were annexed to the decree and it has been argued that if the mortgage deed mentioned in clauses 6 and 7 of the decree had formed the subject-matter of the partition suit, they would have been mentioned in the schedules. This was the only evidence to which reference was made by the trial Court and in the absence of a copy of the plaint in the partition suit it came to a finding that it was 'difficult to say that the suit mortgage formed part of the subject-matter of the suit.' How that inference could have been drawn by the trial Court, I find it difficult to say myself unless it was of opinion that it was for the plaintiff to produce the copy of the plaint and to show that the mortgage in suit did form the subject-matter of the suit. The same contention was put forward once again before me; but I find myself unable to assent to the proposition that it was for the plaintiff to show that the decree was admissible in evidence when she was not even aware of the ground on which the validity of the decree or of the proceedings was impugned. It may be said that to expect the defendant in this case to prove a negative would come into conflict with the rule of evidence that the onus of proof lies on the party who asserts the affirmative of a fact. But a negative allegation must not be confused with the denial of an affirmative one. If a party wishes the Court to believe in the non-existence of a fact, it would be his duty to prove that it did not exist. A reference to the schedules attached to the decree is inconclusive and one cannot say if any arrangement or other facts had not been pleaded in that plaint in regard to the mortgage deeds referred to in cls. 6 and 7 of the decree which would not bring them within the ambit or the subject-matter of that suit. In the absence of any definite evidence on the record I must hold that the decree embodying the compromise was not inadmissible in evidence and could have been looked at to show whether the plaintiff was entitled to sue alone on the basis of the mortgage deed. As already stated there is no finding by the ower appellate Court that the mortgage in suit had not formed

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the subject-matter of the partition suit; but had there been one, I would have been in the absence of any evidence of that fact on the record compelled to disregard it.

In view of the conclusion to which I have arrived in regard to the first contention it seems to be unnecessary to decide the second objection that cl. 7 of the decree was merely a record of a past action and did not in itself purport or operate to create, declare, assign, limit or extinguish some right, title or interest of the value of Rs. 100 or upwards in immovable property for the first time. There is no doubt that if, as stated in paragraph 5 of the plaint, the plaintiff's sister Sivabagyam renounced her claim to the mortgage for the first time by means of the compromise which was embodied in the decree and if the mortgage did not form the subject-matter of the partition suit, the decree could not be said to contain a recital of a past event and would not be without registration admissible in evidence. But since it has not been established that the mortgage in suit did not form the subject-matter of the first litigation, it is unnecessary to examine the matter any further.

Assuming however that the decree was inadmissible in evidence and conceding for the sake of argument that my decision on the first point was not correct, the last contention put forward by Mr. Raja Aiyar has, in my opinion, considerable force. The provisions contained in O. 1, r. 9 of the Code of Civil Procedure are clear enough and make it incumbent on the Court to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. It may be that a Court would in certain exceptional cases refrain from passing a decree in favour of a plaintiff when it finds that all the parties interested in the subject-matter of the suit have not been impleaded but this rule can have no possible application when on account of the death of her sister although it occurred during the pendency of the suit the plaintiff was the only person, when the case was taken up for trial, who was entitled to recover the entire mortgage amount. It is unnecessary to consider here cases where an effective decree could not have been passed on account of a non-joinder of a necessary party or to cases of joint trustees where a trust had vested in them as a body or even those where a plaintiff co-mortgagee was suing for his share of the mortgage although authority is not wanting both of this and other Courts where a portion of the mortgage amount

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has been decreed in favour of one co-mortgagee without impleading other co-mortgagees. (See *Seth Bansiram Jashamal* v. *Gunnia Naga Aiyar*[1], *Baldeo Prasad* v. *Bhola Nath*[2] and *Periakaruppa* v. *Satyanarayanamurthi*[3].) Nor is it necessary here to consider cases where the provisions of S. 22 of the Indian Limitation Act have been held to apply only when a defendant, against whom a relief was sought in the suit, was attempted to be added and not to apply when merely formal defendants were asked to be added after the expiry of the period of limitation more or less to safeguard the rights of the original contesting defendants. (See *Jamna Kunwar* v. *Kunj Behari*[4] and *Bishen Singh* v. *Pirthi Chand*[5].) In a case like the present S. 22 of the Limitation Act has no application at all. No new plaintiff or defendant was being substituted or added in this case. Nor could the plaintiff have been said to be claiming her title through her sister Sivabagyam but must be held to be doing so through her deceased father. The plaintiff's share in the mortgage was simply augmented on account of her sister's death and the plaintiff's title to the whole of the mortgage amount, even if incomplete when the suit was instituted by her was completed by the rule of survivorship. The learned District Judge overruled this contention on the ground that the plaintiff's sister's claim was barred by limitation when she died and the right of survivorship did not accrue to the plaintiff until after that date but it lost sight of the obvious fact that the plaintiff had not sued for half of the mortgage amount but was suing for the whole of the money due under the mortgage deed which she was, according to her allegations, entitled to recover herself. The defect of the want of registration of the decree, even if there was one, was thus cured by Sivabagyam's death. The contention therefore that she was not entitled to the decree passed in her favour by the trial Court must be repelled. The only thing that could possibly be urged, and which was rightly not urged by the learned Counsel for the respondent, was that the Court should not have taken notice of the events which happened after the institution of the suit. That this can be done and at times it is essential for the Courts to do, goes without saying. One need not be hyper-

1. (1930) 59 M.L.J. 928.
2. (1929) I.L.R. 52 All. 134.
3. A.I.R. 1937 Mad. 136.
4. A.I.R. 1937 All. 502.
5. A.I.R. 1937 Lah. 193.

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technical in these matters and ought to take such events as have occurred after the institution of a suit into consideration in order to avoid further unnecessary litigation and to do complete justice between the parties. Instances where learned Judges have taken notice of such facts are very large but it would be sufficient to cite only two here—*Appalasari* v. *Kannamma Nayuralu*[1] and *Ram Ratan Sahu* v. *Mohan Sahu*[2]. I am therefore of opinion that the trial Court was fully justified in taking notice of Sivabagyam's death and granting a decree to the plaintiff.

The appeal must for the above reasons succeed and is allowed. The decree of the lower appellate Court is reversed and that of the trial Court is restored except that it seems to be unnecessary in the circumstances to order the plaintiff to furnish security to the extent of half the mortgage amount. Time for payment, two months. The plaintiff will have her costs both here and in the lower appellate Court.

K. S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Chidambara Thevar .. *Appellant** (*2nd Defendant*)

v.

R. Swaminatha Rao Peshwa (dead) and others .. *Respondents* [*Plaintiff* (*dead*), *1st defendant and L. R. of plaintiff*]:

Chidambara Thevar v. Swaminatha Rao.

Transfer of Property Act (IV of 1882), S. 119—Amending Act (XX of 1929)—Properties given in exchange—Defect in title of properties—Claim for the return of the exchanged properties—Whether a third party innocent of the transaction could be dispossessed—Governing S. 119 of Transfer of Property Act—Amending Act whether affects rights.

Where a person (plaintiff) by a deed of exchange transferred some of his lands to the defendant in return for his lands and the defendant sold the lands he got from the plaintiff to another, but in the meanwhile the plaintiff found that a portion of the lands he got in exchange from the defendant had been subject to a mortgage already and the mortgagee in execution of his decree subsequently deprived him of their possession, in a suit by the plaintiff for the return of the lands given by him to the defendant in exchange,

Held, that following *Sreenivasa Aiyangar* v. *Johnsa Rowther,* (1919) I.L.R. 42 Mad. 690, the transferee could get no better title than that which his

1. (1925) 49 M.L.J. 479 (489). 2. (1907) 6 C.L.J. 74.

* S. A. No. 70 of 1936. 28th September, 1939.

transferor had and that therefore any person in possession of the defendant's lands should be deemed to have taken the lands got in exchange from plaintiff subject to the liability which bound the person who got them from the plaintiff originally, to give back the lands if the property, given in exchange for them, was lost.

There is nothing in S. 119, Transfer of Property Act, which rules out a contingency such as this where an innocent person, into whose hands the lands had come, has to return them.

The Amending Act of 1929 does not affect the transaction completed before the 1st April, 1930. The contract of exchange must be deemed to have as an implied term the provision of the law governing the contract at the time. The governing date will not be the date of dispossession, but the date upon which the right was acquired, which was the date of contract in this case.

Appeal against the decree of the Court of the Subordinate Judge of Tiruvarur dated 12th July, 1935, in A. S. No. 12 of 1934 preferred against the decree of the Court of the District Munsif of Tiruturaipundi dated 29th June, 1933, in O. S. No. 15 of 1933.

V. Ramaswami Aiyar and *R. Sundaralingam* for Appellant.

V. V. Ramadurai for Respondents.

The Court delivered the following

JUDGMENT.—This appeal raises the question of the effect of S. 119, Transfer of Property Act, as it stood before the amendment introduced in 1929. The facts are simple. The plaintiff was the owner of the land in A schedule. The first defendant was the owner of the land in B schedule. On 20th February, 1916, under Ex. A they effected an exchange whereby the plaintiff got schedule B and the first defendant got schedule A. In the deed of exchange each of them describes himself as the owner of the land given in exchange and there are no special covenants excluding the operation of S. 119, Transfer of Property Act. On 24th May, 1916, the first defendant sold the A schedule land which he had got by the exchange to one Nagammal, who on 6th July, 1922, sold the same land to the brother of the second defendant, who is the appellant here. Actually the plaintiff found that part of the B schedule land which he had got by the exchange was included in a big mortgage and the mortgagee got a decree. Under that decree some of the items in B schedule were sold in Court auction to a third party and the plaintiff was dispossessed on 23rd February, 1931. Consequently he filed the suit in which he claims the return of

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the A schedule properties and expresses his willingness to surrender the balance of B schedule properties still in his possession.

Now the law on the subject has been fully discussed by the learned Subordinate Judge with whose conclusions I agree. He follows the decision in *Sreenivasa Aiyangar* v. *Johnsa Rowther*[1], and holds that the transferee can get no better title than that which his transferor had and that therefore the second defendant must be deemed to have taken this land subject to the liability which bound the first defendant to give back the land if the property which he had given in exchange for it to the plaintiff was lost. S. 119 before the amendment merely says that in the absence of a contract to the contrary, the party deprived of the thing or part thereof which he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation or to the return of the thing transferred by him. Granted that this section does not explicitly say that the transferor is entitled to the return even when the property has passed into the hands of an innocent purchaser, there is nothing in the section which rules out such a contingency. The view taken by the Bench which decided *Sreenivasa Aiyangar* v. *Johnsa Rowther*[1], has so far as I am aware, never been dissented from, in this Court. There are, however, three cases of other Courts which have been quoted before me as authority for the opposite view. The decision in *Samar Bahadur Singh* v. *Jit Lal*[2], really is beside the point as it deals only with S. 120, Transfer of Property Act, and does not consider the wording of S. 119. There are two decisions of single Judges *Ganga Singh* v. *Ragho Ram*[3] and *Sujatkhan* v. *Nazafah*[4], in which a view different from that of this Court has been adopted, that is to say, the view that S. 119 prior to the amendment contemplated only the liabilities of the actual parties to the exchange and did not contemplate the imposition of any liability on an innocent purchaser. That is, of course, substantially the result of the amendment to the section, but I do not think that the original section should be interpreted in the light of the subsequent change in the law. I am bound by the decision in *Sreenivasa Aiyangar* v. *Johnsa Rowther*[1], which is

1. (1919) I.L.R. 42 Mad. 690.
2. (1924) I.L.R. 46 All. 359.
3. A.I.R. 1934 Lah. 934 (2).
4. A.I.R. 1934 Nag. 61.

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against the view for which the appellant contends. I may remark that Gour's Transfer of Property Act takes the opposite view but he quotes no authority at all in support of it. I must therefore on the authorities as they stand uphold the view of the learned Subordinate Judge.

A further contention is that the case will be governed by the amended S. 119 because the dispossession of the plaintiff was in February, 1931, after the new Act came into force. Here again I must decide against the appellant. S. 63 of the Amending Act lays it down that S. 59 which amends S. 119 shall not affect the terms of incidents of any transfer of property made or effected before the first day of April, 1930, or any right, title, obligation or liability acquired, created or incurred before such date. It seems to me that the contract of exchange must be taken to have as an implied term the provision of law governing the contract at that time. It also seems to me that by the contract, the plaintiff must be deemed to have acquired a right to work out his remedy of restoration, as against the transferee and those claiming under him, in the contingency of his being dispossessed at some future date. The governing date will not be the date of dispossession, but the date upon which the right was acquired and that is, in my opinion, the date of the contract.

In the result therefore I dismiss the appeal with costs. Leave to appeal is granted.

Leave granted.

K.C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Kona Adinarayana .. *Appellant* (1st Defendant)*

v.

Dronavalli Venkatasubbayya and others .. *Respondents (Plaintiffs).*

Adinarayana v. Venkatasubbayya.

Specific performance—Contract for sale of land—Vendee entering into possession—One of the vendors (member of a joint Hindu family) minor—Right of vendors to sue for specific performance.

Where the vendors were (three brothers forming a joint Hindu family) one of whom was a minor, and the vendee had entered into possession, a suit

*L. P. A. No. 75 of 1937. 4th December, 1939.

Adi-narayana v. Venkata-subbayya.

by the vendors for specific performance at a time when the minor had attained majority is maintainable.

Hoggart v. *Scott*, (1830) 1 Russ. & M. 293: 39 E.R. 113 and *Salisbury* v. *Hatcher*, (1842) 2 Y. & C.C.C. 54: 63 E.R. 24, applied.

Appeal preferred under cl. 15 of the Letters Patent to the High Court against the decree of the Hon'ble Mr. Justice Venkataramana Rao in S. A. No. 726 of 1935 preferred against the decree of the Court of the Subordinate Judge of Masulipatam in A. S. No. 27 of 1936 (O. S. No. 272 of 1933, District Munsif's Court, Gudivada).

P. Somasundaram for Appellant.

P. Satyanarayana Rao for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appeal arises out of a suit for specific performance of a contract for sale of land tried in the Court of the District Munsif of Gudivada. The respondents were the plaintiffs. On the 4th August, 1930, by a contract in writing the respondents agreed to sell three-quarters of an acre of land in the Kistna District at the price of Rs. 1,095. The respondents are brothers and are members of an undivided family. The third respondent was a minor at the time the contract was entered into. The contract was signed by the major brothers and by the first respondent as the manager of the family and as the guardian of the minor. The appellant went into possession immediately after the execution of the contract and admittedly he has remained in possession and has enjoyed the rents and profits ever since. The suit for specific performance was filed on the 4th August, 1933. The appellant, although he was in possession and was treating the land as his own, set up the defence that the suit for specific performance would not lie as one of the vendors was a minor. His attitude in the circumstances can only be described as that of a very dishonest person. At the time of the institution of the suit the minor member of the vendor family had reached majority. The District Munsif granted the respondents a decree, but on appeal the Subordinate Judge of Masulipatam held that the major brothers alone were entitled to sue for specific performance. Accordingly, he limited the decree to two-thirds of the land on payment of two-thirds of the purchase consideration. The appellant then appealed to this Court and the first and second respondents filed a memorandum of cross-objections. The appeal

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was heard by Venkataramana Rao, J., who restored the decree of the District Munsif, but gave a certificate permitting of this Letters Patent Appeal.

In holding that the respondents were entitled to maintain a suit for specific performance the learned Judge relied on the decisions in *Hoggart* v. *Scott*[1] and *Salisbury Hatcher*[2]. In the first of these cases it was held that a plaintiff in a bill for the specific performance of a contract was entitled to a decree if, at the time of the hearing, he would show a good title, although he had not a good title at the time of the contract. Leach, M.R., observed:

> "The defendant, if he had thought fit, might have declined the contract as soon as he discovered that the plaintiffs had no title; and he was not bound to wait until they had acquired a title; but, he not having taken that course, it is enough that at the hearing a good title can be made."

In *Salisbury* v. *Hatcher*[2], Knight Bruce, V. C., said:

> "In cases of specific performance the want of mutuality is a consideration generally material, but it is contrary to principle and authority to say that perfect mutuality is requisite in order to call a Court of Equity into action. There are cases in which plaintiffs have had a decree for specific performance against defendants, who, when the bill was filed, were not in a condition to enforce specific performance in their own favour. Where no legal invalidity affects the contracts, the enforcement of it in this Court is matter of judicial discretion."

In that case the purchaser not having rejected the purchase as soon as he had ascertained the real interest of the vendor and the vendor later having acquired a perfect title a decree for specific performance was passed.

As Venkataramana Rao, J., has pointed out the fact that the appellant remained in possession of the land and did not repudiate the contract the right to repudiate must be deemed to have been waived. There is nothing in the law of India which prevents the application of the principle applied in *Hoggart* v. *Scott*[1] and *Salisbury* v. *Hatcher*[2] and I consider that those principles have direct application here. It would indeed be regrettable if the Court could not give to the respondents the relief they ask against the injustice which they have suffered at the hands of the appellant. At no stage has he repudiated the contract but he has refused to pay the price of the land which he has enjoyed for over nine years.

The appeal will be dismissed with costs throughout.

K. S. ——— *Appeal dismissed.*

1. (1830) 1 Russ. & M. 293: 39 E.R. 113.
2. (1842) 2 Y. & C.C.C. 54: 63 E.R. 24.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE KUNHI RAMAN.

The Official Assignee, Madras, representing the estate of S. N. Firm (Insolvents) .. *Appellant** *(17th Defendant)*

v.

Natesam Pillai .. *Respondent (Plaintiff).*

Official Assignee, Madras *v* Natesam Pillai.

Banker and customer—Money kept in trust—Test for ascertaining—Money put in for transmission—Fixed deposit account not opened—Banker becoming insolvent before payment—Right of depositor to be paid in full—Fiduciary relationship or relationship of debtor and creditor.

Defendants 1 to 7 were members of a Hindu joint family carrying on business at Trichinopoly under the name of a banking firm which suspended payment on 30th April, 1935. The plaintiff had arranged to purchase certain lands in Tuticorin. The third defendant suggested to the plaintiff that the said transaction could be arranged through their branch office at that place. The plaintiff paid certain sums of money into the defendant's firm between the 25th March and the 17th April, 1935, on the above account. After defendants were adjudged insolvents the plaintiff sued to recover the money paid by him and pleaded that the payment had been made by him under an arrangement that the defendants should keep the amount in trust for him until he decided how it should be disposed of. It appeared that the plaintiff had no prior banking transactions with the defendant's firm. The account books of the defendants showed that the plaintiff's money was credited in *anamath* or suspense account to await the instructions of the plaintiff as regards their disposal. The defendants' oral evidence showed that when amounts were paid to their firm in current account or fixed deposit, generally pass books and cheque books used to be given and usually agreements used to be entered into regarding the interest payable on the deposits, but this procedure was not followed when the plaintiff's money was received.

Held, that money paid by the plaintiff was received by the defendants' firm in a fiducary capacity and not as between a Bank and its customer and that the plaintiff was consequently entitled to preferential payment in full of the money paid by him.

Hart on Banking, Vol. I, page 582; in re *Brown*: Ex parte *Plitt*, 60 L.T. 397: 6 Mor. 81; *Burdick* v. *Garrick*, (1870) 5 Ch. App. 233; *Great Western Railway Co.* v. *London and County Banking Co.*, (1901) A. C. 414 and *Commissioners of Taxation* v. *English, Scottish & Australian Bank, Ltd.*, (1920) A.C. 683, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly dated 12th December, 1936 and made in O. S. No. 64 of 1935.

K. P. Ramakrishna Aiyar for Appellant.

B. Sitarama Rao and *A. V. Narayanaswami Aiyar* for Respondent.

The judgment of the Court was delivered by

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* Appeal No. 90 of 1937. 16th November, 1939.

Official Assignee, Madras v. Natesam Pillai.

Kunhi Raman, J.

Kunhi Raman, J.—The Official Assignee of Madras who was impleaded as the 17th defendant in O. S. No. 64 of 1935 on the file of the Subordinate Judge's Court of Trichinopoly is the appellant. He was brought on record as representing the estate of defendants 1 to 7 who were adjudicated insolvents in I. P. No. 345 of 1935 on 6th September, 1935. They were members of a joint Hindu family which was carrying on a banking business under the name and style of the S. N. Firm which suspended business on 30th April, 1935. Between 25th March, 1935 and 17th April, 1935, the plaintiff-respondent had paid this firm a total sum of Rs. 6,950 at Trichinopoly in the following circumstances. The plaintiff had arranged to purchase certain lands in the village of Thiruvarambur from one S. V. Nallasivam Pillai of Tuticorin. When the plaintiff told the third defendant of this plan the latter suggested that the transaction could be arranged through the defendant's branch at Tuticorin which he said was close to Nallaperumal Pillai's shop of that place. The plaintiff's case was that the payment referred to above was made by him under an arrangement that the firm of defendants 1 to 7 should keep the total amount in trust for him until he decided how it should be disposed of. The plaintiff had no prior banking transactions with the defendants' firm. The plaintiff's case was that the amount was not deposited by him with the firm and that when he made the payment, no relationship of banker and customer arose between him and the firm. On the other hand the defendants' firm received the amount in a fiduciary capacity. He therefore wanted to recover the full amount from the assets of the firm and not merely in the shape of dividends declared from time to time by the Official Assignee.

The claim was resisted in the Court below on the ground that the plaintiff was not entitled to any preferential treatment in respect of the total amount paid by him because it was paid by him as a deposit which was to carry interest at 5 annas per cent. per annum in the ordinary course of the banking business of the firm. This contention of the defendants was negatived by the trial Court which has found on the evidence that the amount was paid by plaintiff on ***anamath*** account on the understanding that the total amount should be paid back to him when he intended to go to Tuticorin or that a draft should be given to him for the total amount to be paid at Tuticorin by the

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Kunhi Raman, J.

defendants' branch there. The defendants suspended payment before the plaintiff had made up his mind as to what course he should adopt. The learned Subordinate Judge states in his judgment and quite correctly too, that had the plaintiff adopted the second course and had he taken a draft on the defendants' branch at Tuticorin the position taken up by the plaintiff at the trial might have been untenable. It might then have been assumed that the transaction was an ordinary banking transaction between plaintiff and the firm which would have relegated the plaintiff to the position of an ordinary customer of the bank who would have had to take his turn with the other customers of the bank for obtaining satisfaction. On the ground therefore that the bank held the plaintiff's money in a fiduciary capacity as the result of which the property in the amount did not vest in the Official Assignee, the Court below has recognised the plaintiff's claim to preferential treatment along with such other persons as may be similarly situated. The plaintiff's suit has accordingly been decreed and it is against this decree that the present appeal is preferred.

The learned advocate for the appellant contends that the money was paid to the bank to be held "at call", that is to say, to be paid back to plaintiff whenever he demanded payment. He points out that this shows that in fact it was paid into a current account to the credit of the plaintiff and that therefore the plaintiff must be regarded as an ordinary customer of the bank and not as a person who had entrusted money to the bank to be held in a fiduciary capacity.

The learned advocate for the respondent on the other hand stresses the fact that the plaintiff did not at any time have a banking account with the firm. The amount was paid by the plaintiff at the invitation of the third defendant. No cheque book or pass book was given to the plaintiff by the firm. No entry was made of the payment in the current account or fixed deposit register of the bank. The firm did not produce its fair Day book at the trial. No ledger was opened crediting plaintiff with the amount until at any rate the 30th April, 1935, by which time the bank had already suspended payment. He therefore argues that the payment was made to the firm as bailee or agent and that consequently the view taken by the lower Court is correct.

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Kunhi Raman, J.

It must be stated at the outset that the appellant's case that the amount was paid into plaintiff's current account and that it was to carry interest at 5 annas per cent. has not been substantiated. It seems to us that the test for ascertaining whether there was any fiduciary relationship or only the relationship of banker and customer between the parties is put succinctly in Hart on Banking, Volume I (Fourth Edition) at page 582, where the decision in In re *Brown*: Ex parte *Plitt*[1] is considered. In that case Julius Plitt handed a cheque to Alexander Brown a banker with whom he had no banking account and obtained a receipt to the effect that the cheque was given for collection. Brown was adjudicated bankrupt after he had collected the amount of the cheque and before he had paid the whole of it to Plitt. The trustee claimed the balance of the proceeds of the cheque. Cave, J., observed in the course of the argument,

"Where the debtor is to collect and remit, there is confidence and trust. Where the debtor is to use and repay on demand, there is no trust."

It was held in that case that the relation between the parties was not the ordinary relation of banker and customer. Plitt had handed the cheque to Brown "for Brown to receive and hold it for him. If so it is not the ordinary case of banker and customer.

In *Burdick* v. *Garrick*[2], Lord Hatherley, L.C., says as follows:—

"I apprehend that the true rule applicable to these cases is to be found in the case of *Foley* v. *Hill*[3], where it is clearly stated by Lord Cottenham, who distinguishes between the confidence reposed in a factor or agent and the confidence reposed in a person who is merely in the position of banker. A mere banker who takes charge of his customer's money is not in any fiduciary relation whatever to him with respect to the particular coins or notes deposited, because it is the ordinary course of trade to make use of them for his own profit. He does make use of them, and he invests the money deposited with him, and his customer does not require from him those very coins or exchequer bills which he deposited with him. But in the present case we have an agent who is intrusted with those funds, not for the purpose of being remitted when received to the principal, but for the purpose of being employed in a particular manner, in the purchase of land or stock; and which moneys the factor or agent is bound to keep totally distinct and separate from his own money; and in no way whatever to deal with or make use of them. How a person who is intrusted with funds under such circumstances differs from one in an ordinary fiduciary position I am unable to see."

1. 60 L.T. 397 : 6 Mor. 81.
2. (1870) 5 Ch. App. 233 at 240.
3. (1848) 2 H.L.C. 28 at 35 : 9 E.R. 1002.

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The mere fact that the plaintiff had no prior banking transaction with the defendants' firm will not of course by itself be sufficient to exclude the possibility of the plaintiff having become a customer of the bank when he paid in the amounts. This is made clear in the judgment of the Privy Council in *Commissioners of Taxation* v. *English, Scottish and Australian Bank, Ltd.*[1] On page 687, occur the following sentences:

"Their Lordships are of opinion that the word 'customer' signifies a relationship in which duration is not of the essence. A person whose money has been accepted by a bank on the footing that they undertake to honour cheques up to the amount standing to his credit is, in the view of their Lordships, a customer of the bank in the sense of the statute, irrespective of whether his connection is of short or long standing. The contrast is not between an habitue and a new comer, but between a person for whom the bank performs a casual service, such as, for instance, cashing a cheque for a person introduced by one of their customers, and a person who has an account of his own at the bank." (*See also* the opinion of Lord Davey in *Great Western Railway Co.* v. *London and County Banking Co., Ltd.*[2])

Again the mere fact that a customer gives directions to a banker to apply in a particular manner moneys standing to his credit will not necessarily make the relationship between the parties fiduciary. This was made clear in the decision reported in *Dharmambal Ammal* v. *Official Liquidator, T. N. and Q. Bank*[3], where money was invested in a Bank's Savings Bank account and a standing order was given that out of this account payment must be made towards certain recurring chit subscriptions payable by the depositor. The scope of the decision in *Farley* v. *Turner*[4] is explained in the judgment in that case, and it was held that the depositor was a customer of the bank and not a person entitled to preferential treatment since no trust was created.

The decisions of this Court reported in *Official Assignee of Madras* v. *Rajam Aiyar*[5], *Official Asignee of Madras* v. *Melapparangavur Sarvajana Sahaya Nidhi*[6] and *Official Assignee of Madras* v. *Smith*[7] do not lay down any principles opposed to the rulings quoted above.

The account books of the parties in the present case show that the amounts were credited in *anamath* or suspense account to await the instructions of the plaintiff as regards their disposal. The defendants' oral evidence shows that when amounts were

1. (1920) A.C. 683.
2. (1901) A.C. 414 at 420.
3. (1939) M.W.N. 1063.
4. (1857) 26 L.J. Ch. 710.
5. (1910) I.L.R. 36 Mad. 499 (F.B.).
6. (1910) I.L.R. 34 Mad. 125.
7. (1908) I.L.R. 32 Mad. 68.

Official Assignee, Madras v. Natesam Pillai.

Kunhi Raman, J.

paid to the bank in current account or fixed deposit generally pass books and cheque books used to be given and usually agreements used to be entered into regarding the interest payable on the deposits. This procedure was not followed when the plaintiff's moneys were received. Applying the principles of law laid down in the authorities quoted above, we hold that the amounts were received by the bank in a fiduciary capacity and not as between a bank and its customer and that consequently the view taken by the lower Court is correct. The appeal therefore fails and must be dismissed with costs payable out of the estate.

B.V.V. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE GENTLE AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

In the matter of K. Srinivasa Rao, First Grade Pleader, Coimbatore.*

F.B.

In the matter of Srinivasa Rao.

Legal Practitioners' Act (XVIII of 1879), S. 13—Madras Civil Courts Act (III of 1873), S. 3-A—High Court appointing authority to inquire into the conduct of a practitioner—District Judge appointed—Delegation by him of the authority—Improper—Whether by agreement to withdraw or withdrawal of a petition by complainant, proceedings against practitioner could be dropped.

Where the Court has reason to believe that a practitioner may have been guilty of professional misconduct, it cannot allow proceedings to be dropped as the result of an agreement between the complainant and the practitioner, or even if the complainant, without any agreement, does not wish to proceed with the matter.

Unless a tribunal is constituted beforehand the inquiry cannot be lawful. The approval of a tribunal *ex post facto* by the High Court is repugnant to the spirit of the Act and the wording of S 13 of the Legal Practitioners' Act.

If the tribunal which conducted the inquiry was not validly constituted, subsequent acquiescence in the proceedings would not turn it into a lawful tribunal.

An Additional District Judge may lawfully deal with matters which come within the province of the District Judge under the Madras Civil Courts Act, S. 3-A. But in the absence of anything in the Legal Practitioners Act for a District Judge to hold the inquiry, the High Court having appointed him to hold an inquiry into the conduct of a practitioner, he cannot delegate his authority to the additional District Judge because the High Court and not the Act nominates the tribunal for inquiry.

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* 5th December, 1939.

F.B.

In the matter of Srinivasa Rao.

Notice under S. 13 (*b*) of the Legal Practitioners' Act issued to Sri K. Srinivasa Rao, First Grade Pleader, Coimbatore, calling upon the said Mr. K. Srinivasa Rao, to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court for grossly improper conduct in the discharge of his professional duty in that he acting as Pleader for one G. Thimmappa in I. P. No. 32 of 1926 on the file of the District Court, Coimbatore (insolvency of one Balakrishna Mudaliar) received from the Official Receiver of Coimbatore two sums of money, namely, Rs. 2,223-7-2 and Rs. 2,038-2-7, as dividends on 10th April, 1930 and 11th August, 1931, respectively and kept the said Thimmappa in ignorance without intimating to him of the fact of the receipt of the above sums; that he misappropriated the said sums for his own use and thereby rendered himself liable for professional misconduct under the provisions of the Legal Practitioners' Act.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) in support of the Notice.

T. R. Venkatarama Sastri for *M. Krishna Bharathi* for the Pleader.

The Complainant not represented.

The Court made the following

Leach, C.J.

ORDER. *The Chief Justice.*—The respondent is a pleader practising in the Coimbatore District. In February, 1937, one G. Thimmappa, a merchant residing and carrying on business in Bellary, presented a petition to this Court in which he charged the respondent with professional misconduct. The Court considered that the charges made called for inquiry and passed an order directing the District Judge of Coimbatore to hold the inquiry, the case falling within S. 13 of the Legal Practitioners' Act. When the matter came before the District Judge the petitioner filed a statement in which he said that he was satisfied that the respondent, who had been his pleader for a considerable time, had not acted *mala fide*; and that his claim had been settled by the respondent, and he wished to withdraw the petition. In the circumstances, the District Judge thought it unnecessary to proceed with the inquiry and submitted the record to this Court with his remarks. This Court considered that the District Judge should have proceeded with the inquiry, notwithstanding that

F.B.

In the matter of Srinivasa Rao.

Leach, C.J.

the petitioner had expressed a desire to withdraw the petition. Where the Court has reason to believe that a practitioner may have been guilty of professional misconduct, it cannot allow proceedings to be dropped as the result of an agreement between the complainant and the practitioner, or, even if the complainant, without any agreement, does not wish to proceed with the matter.

By an order dated 7th March, 1939, the Court remanded the case to the District Judge with direction to proceed. Without reference to this Court the District Júdge directed the Additional District Judge to hold the inquiry, which he did, and his report is now before us. Mr. Venkātarama Sastri on behalf of the respondent has raised a preliminary objection. He says that inasmuch as the inquiry has been conducted not by the District Judge, who was directed to hold the inquiry, but by the Additional District Judge, it is unlawful and the Court cannot take action on it. In other words, he says that the District Judge, having been ordered to hold the inquiry, could not delegate his power to the Additional District Judge and that this Court is precluded from giving approval *ex post facto* to the inquiry conducted by the Additional District Judge. The learned Advocate-General has contended that if the Court is satisfied with the report it can take action on it. He has also contended that the District Judge had full power by reason of S. 3-A of the Madras Civil Courts Act, 1873, to transfer the matter to the Additional District Judge. Further he has said that inasmuch as the respondent did not take objection to the Additional District Judge holding the inquiry when the matter was in the District Court but appeared and took part in the proceedings throughout he cannot now be allowed to raise the objection.

I will deal first with the argument advanced by the learned Advocate-General that the finding of a tribunal of inquiry can be accepted notwithstanding that the tribunal was not appointed by the Court for the purpose. The opening clause of S. 13 of the Legal Practitioners' Act is in these words:

"The High Court may also, after such inquiry as it thinks fit, suspend or dismiss any pleader or mukhtar holding a certificate as aforesaid."

It is said that the words "after such inquiry as it thinks fit" leave it open to the Court to give approval *ex post facto*. I am unable to accept this argument. The Act contemplates

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the High Court directing an inquiry before action is taken. The Court has duties to perform under the Act and the first duty is to nominate a person or persons to hold the inquiry into the alleged misconduct. Unless the tribunal is constituted beforehand the inquiry, in my opinon, cannot be lawful. I regard the suggestion that approval of a tribunal may be given *ex post facto* as being repugnant to the spirit of the Act and the wording of S. 13.

The argument that because no objection was raised in the District Court to the Additional District Judge conducting the inquiry he cannot be allowed to raise the objection now is also one which I cannot accept. If the tribunal which conducted the inquiry was not validly constituted acquiescence in the proceedings would not turn it into a lawful tribunal. If illegal in its inception, illegal it would remain.

The only argument which calls for serious consideration is the argument that S. 3-A of the Madras Civil Courts Act gave the District Judge power to direct the Additional District Judge to conduct the inquiry. That section reads as follows:—

"When in the opinion of the High Court, the state of business pending before the Judge of any District Court (hereinafter called the District Judge) so requires, the Local Government may appoint one or more Additional District Judges to that Court for such period as they may deem necessary, the Additional District Judges so appointed shall discharge all or any of the functions of the District Judge, under this Act or any other law for the time being in force which the District Judge may assign to them, and, in the discharge of those functions, they shall exercise the same powers as the District Judge."

Therefore an Additional District Judge may lawfully deal with matters which come within the province of the District Judge under the Act or any other law for the time being in force. The Civil Courts Act only refers to civil suits and appeals from Judges subordinate to the District Judge. The matter now before us is neither a suit nor an appeal. The learned Advocate-General has, however, said that the present case falls within the words "or any other law for the time being in force." I consider that the Legislature had here in mind Acts such as the Indian Companies Act, the Indian Divorce Act and the Succession Act, which confer upon a District Judge jurisdiction in specified matters. If there were a clause in the legal Practitioners' Act which directed the District Judge to hold the inquiry in a case like the present one he certainly would have power under S. 3-A of the Madras Civil Courts Act to assign

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the inquiry to the Additional District Judge, but there is nothing in the Legal Practitioners' Act which directs the District Judge to hold the inquiry. The Act leaves the matter entirely in the hands of the High Court. The High Court and not the Act nominates the tribunal. Therefore when the High Court directs a District Judge to hold an inquiry into a charge of professional misconduct the District Judge does not hold the inquiry under the Act but under the orders of the High Court. Before a District Judge can be allowed to pass on his duty to some one else there must be very clear authority for his action. Certainly the Madras Civil Courts Act does not provide it. In my opinion, the District Judge having been directed by this Court to hold the inquiry he had no power of delegation. No doubt he thought that he had authority under S. 3-A of the Madras Civil Courts Act to transfer the duty to the Additional District Judge, but I consider that in so doing he erred. It would have been a different matter if he had received the sanction of this Court beforehand, but he directed the Additional District Judge to hold the inquiry without making any reference to this Court.

It follows from what I have said that I am not prepared to read S. 3-A of the Madras Civil Courts Act in the way suggested by the learned Advocate-General and I feel bound to uphold the preliminary objection raised on behalf of the respondent. The findings of the Additional District Judge will be set aside and the District Judge directed to hold a fresh inquiry into the allegations made against the respondent and present his own report to this Court in due course. In order to prevent any misunderstanding I would add that this Court has not considered the findings of the Additional District Judge and will deal with the charges against the respondent merely on the report of the District Judge when it is submitted.

Gentle, J.

Gentle, J.—I agree.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I agree.

K.C. *Remanded for inquiry.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

In the matter of The Indian Succession Act (XXXIX of 1925)
and
In the matter of the Goods of Edward Carmichæl McCankie.

Wilfrid Hazell Sell .. *Petitioner** (*Appellant*).

McCankie, *In the goods of.*

Indian Succession Act (XXXIX of 1925), Ss. 241, 291, 228—Letters of administration with copy of will annexed—If can be granted to agent of executor resident abroad without requiring security.

A probate of the will was obtained in England where the testator died. The executrix was not able to come to India to take out letters of administration and granted a power of attorney to the petitioner to apply as her agent. The practice, since the Succession Act of 1865, has been to grant letters of administration with a copy of the will annexed in cases such as this without requiring security to be furnished. Somayya, J., considered that the practice was in conflict with the wording of S. 241 and refused to follow it and held that the appropriate section was S. 228 under which security would have to be furnished. On appeal having regard to the long practice and the scheme of the Act, *held,* letters of administration should be issued under S. 241 without security.

In the goods of Leckie, (1875) 15 Beng. L. R. App. 8, followed

In the goods of William Ashton, (1905) All. W. N. 251, not followed.

On appeal from the order of the Hon'ble Mr. Justice Somayya dated the 14th day of September, 1939 and made in the exercise of the Original Testamentary Jurisdiction of the High Court in O. P. No. 164 of 1939.

C. Krishnaswami Aiyar instructed by *King and Partridge* for Appellant.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *The Government Solicitor* for the Government.

K. Rajah Aiyar (amicus curiæ).

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—This is an appeal from an order of Somayya, J., directing that letters of administration to the estate of one Edward Carmichæl McCankie be issued to the appellant on the furnishing of security under S. 291 of the Indian Succession Act. The appellant contends that the learned Judge should have held that he was entitled to letters of

* O. S. A. No. 51 of 1939. 12th December, 1939.

McCankie, *In the goods of.* — Leach, C.J.

administration with a copy of the will annexed under S. 241 of the Act, in which case he could not be called upon to furnish security. The deceased died in Littlehampton, England, leaving a will dated the 21st of February, 1936. Probate of the will was obtained in England. The testator appointed Mrs. Madeline Emily Hawkins, his executrix. The executrix was not able to come to India to take out letters of administration and she granted a power-of-attorney to the appellant to enable him to apply as her agent. Since the Succession Act of 1865 it has been the practice of this Court to grant letters of administration with a copy of the will annexed in cases such as this without requiring security to be furnished. The Court is informed that the same practice has prevailed in the Calcutta and Bombay High Courts. The learned Judge considered that the practice was in conflict with the wording of S. 241 and he refused to follow it. He held that the appropriate section was S. 228 which meant that security would have to be furnished.

S. 228 says that when a will has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of the Province, whether within or beyond the limits of His Majesty's dominions, and a properly authenticated copy of the will is produced, letters of administration may be granted with a copy of the authenticated copy of the will annexed. S. 228 is in Chapter I of Part IX of the Act. This Chapter contains general provisions with regard to the grant of probate and letters of administration. S. 241 falls in Chapter II which deals with limited grants. This section says that when an executor is absent from the province in which the application is made, and there is no executor within the province willing to act, letters of administration, with the will annexed, may be granted to the attorney or agent of the absent executor, for the use and benefit of his principal, limited until he obtains probate or gets a grant of letters of administration to himself. In addition to the assistance rendered by the learned Advocate for the appellant the Court has had the assistance of the learned Advocate-General. It has been accepted by Counsel that, unless the executrix in England can avail herself of the provisions of S. 241, she must come out to India and apply herself for letters of administration, there being no other section which can be read as permitting of an application being made by an agent in such a case as this. Ss. 242 and 243 allow applications

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by agents but they do not apply here. S. 242 relates to the case where the person to whom, if present, letters of administration with the will annexed might be granted is absent from the province, and S. 243 to an application for letters of administration on intestacy.

I do not think that it could have been the intention of the Legislature to compel an executor living abroad to come to this country to take out letters of administration personally when he has obtained probate of the will in his own country. It might be impossible for him to come to India and then the estate here would have to remain unadministered. Although it has never before been called upon to give a judicial pronouncement on the question this Court, in common with the other Presidency High Courts, has, as I have already indicated, read S. 241 as covering an application for letters of administration with a copy of the will annexed when the original cannot be produced because it is held by a Court abroad as the result of that Court, having granted probate. The question was raised in the Calcutta High Court in 1875 and it was decided that S. 212 of the Succession Act of 1865, which is the same as S. 241 of the present Act, did apply in a case like the present one. The Calcutta case is *In the goods of Leckie*[1]. There a British subject possessed of property both in India and in England died in England leaving a will by which he appointed four persons to be his executors in England and one person to be his executor in India. The English executors obtained probate in England, but the Indian executor renounced. An application was then filed in the Calcutta High Court for letters of administration with the will annexed to be granted to the attorney of the English executors. It was held that the attorney was entitled to the grant. Phear, J., who decided the case said that it would be in accordance with the practice of the Court that letters of administration with the will annexed should be granted to the attorney of the English executors.

In the course of his judgment Somayya, J., expressed the opinion that S. 241 is intended to apply to the case where the executor is temporarily absent from the province but his return is contemplated. I do not share this opinion. I appreciate that the section might be read, as the learned Judge has read it, as

1. (1875) 15 Beng.L.R. App. 8.

McCankie, *In the goods of.*

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applying only to the case where there is an application for letters of administration with the original will annexed, but to do so is to disregard the scheme of the Act. Inasmuch as it has been read by this Court and other High Courts for so many years in the broader sense and in a sense which avoids anomaly and hardship I consider that the Court would not be justified in insisting on the strict construction.

The learned Judge in the course of his judgment has referred to two cases—*In the goods of William Ashton*[1] and *Deputy Commissioner of Singhbhum* v. *Jagadish Chandra Deo Dhabal Deb*[2]. It has not been suggested at the Bar that the latter case has application and in my opinion it has no bearing. The former case is in point. A Bench of the Allahabad High Court there insisted on the observance of the strict letter of S. 212 of the Act of 1865. The argument that the strict letter must be followed is one that cannot be lightly brushed aside, but I consider that it should not prevail in view of the fact that it has been read differently for over half a century and that the broader construction is in keeping with the scheme of the Act. Consequently I would allow the appeal and direct that letters of administration be issued to the petitioner under S. 241 which means without security.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I have come to the same conclusion but not without hesitation. But for the uniform practice of this Court and of the Bombay and Calcutta High Courts I should have been inclined to agree with the opinion of Somayya, J., which is the same as the opinion expressed by the Allahabad High Court. I do not feel that the language of S. 241 is sufficiently clear to set aside this long practice, more especially when a strict interpretation is likely to lead to this result, namely, that there would be no provision in the Act for an agent of an executor in a foreign country to apply for letters of administration in this country in circumstances similar to those present in this case.

K. S. *Appeal allowed.*

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1 (1905) All.W.N. 251. 2. (1921) 6 Pat.L.J. 411.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

S. V. Subba Rao .. *Appellant** (*3rd Respondent*)

v.

The Calicut Co-operative Urban Bank Limited, Calicut .. *Respondent* (*Petitioner*).

Subba Rao *v.* Calicut Co-operative Urban Bank Ltd., Calicut.

Madras Co-operative Societies Act (VI of 1932), S. 51—Award under—Application for execution—Limitation Act, Art. 182—Applicability

By r. 15 (7) (*c*) of the rules framed under the Madras Co-operative Societies Act, the Court shall enforce the award as if it were a final decree of the Court and Art. 182 and not Art. 181 of the Limitation Act applied to execution of an award.

The Co-operative Credit Society v. *Chinnaswami Udayan,* (1936) 71 M.L.J. 759: I.L.R. (1937) Mad. 495, overruled.

Sambasiva Mudaliar v. *Panchanada Pillai,* (1907) 17 M.L.J. 441: I.L.R. 31 Mad. 24, distinguished.

The Hindu Religious Endowments Board, Madras v. *The Shirur Mutt,* (1934) 68 M.L.J. 200: I.L.R. 58 Mad. 760 and In re *Belvedere Jute Mills, Ltd.,* (1927) I.L.R. 55 Cal. 499, applied.

Decision of Venkataramana Rao, J., (1939) 1 M.L.J. 695, affirmed.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Venkataramana Rao dated the 12th April, 1938 and passed in A.A.A.O. No. 2 of 1938 preferred to the High Court against the order of the District Court of South Malabar dated 13th December, 1937 and made in A.S. No. 175 of 1937, preferred against the order of the Court of the District Munsif of Calicut in E.P. No. 5320 of 1936 (A.R.C. No. 394 of 1931-1932).

N. R. Sesha Aiyar for Appellant.

K. Kuttikrishna Menon for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal raises the question whether Art. 181 or Art. 182 of the Limitation Act applies to the execution of an award passed under S. 51 of the Co-operative Societies Act, 1912. If the article which applies is Art. 181 an award which was filed in the Court of the District Munsif of Calicut for execution will be time barred. If Art. 182 applies it still may be executed. The District Munsif and the District Judge of South Malabar on appeal held that Art. 182

* L.P.A. No. 74 of 1938. 23rd November 1939.

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applies and their decision was confirmed in a second appeal which was decided by Venkataramana Rao, J.* The learned Judge has dealt with the argument in full and we are in complete agreement with his observations.

R. 15 (7) (*c*) of the rules framed under the Act states that on application to the Civil Court having jurisdiction over the subject-matter of the decision or award, the Court shall enforce the decision or award as if it were a final decree of the Court, and were it not for the judgment of Cornish, J., in *The Co-operative Credit Society* v. *Chinnaswami Udayan*[1], we should not have thought that there would have been any doubt about the applicability of Art. 182. It is conceded by the learned advocate for the appellant, as it must be, that an award under the Co-operative Societies Act attracts all the provisions of the Code of Civil Procedure in the matter of execution. If it attracts all the provisions of the Code with regard to execution it must in our opinion of necessity attract the provisions of the Limitation Act which apply to the execution of decrees. The award when it is filed has to be executed as a decree of the Court and in effect it becomes a decree of the Court. As the provisions of the Code of Civil Procedure admittedly apply, the provisions of S. 48 of the Code must apply. S. 48 provides that a decree shall run for a period of twelve years, provided, of course, that steps in execution are taken at intervals of not more than three years as required by Art. 182 of the Limitation Act. If S. 48 applies it follows that the appropriate article is 182 and not Art. 181. If Art. 182 did not apply but Art. 181 did there would be a conflict as Art. 181 fixes a period of three years and S. 48 a period of twelve years.

Cornish, J., considered that the question was really decided in *Sambasiva Mudaliar* v. *Panchanada Pillai*[2], but we do not accept that opinion. *Sambasiva Mudaliar* v. *Panchanada Pillai*[2], related to the provisions of S. 40 of the Revenue Recovery Act, the wording of which is very different from the wording of r, 15 (7) (*c*) of the Co-operative Societies Act. We can see no reason for applying the decision in *Sambasiva Mudaliar* v. *Panchanada Pillai*[2], to a case like the present one, and we consider that *The Co-operative Credit Society* v. *Chinnaswami Udayan*[1] was wrongly decided.

* (1939) 1 M.L.J. 695.
1. (1936) 71 M.L.J. 759: I.L.R. (1937) Mad. 495.
2. (1907) 17 M.L.J. 441: I.L.R. 31 Mad. 24.

Subba Rao v. Calicut Co-operative Urban Bank Ltd., Calicut.

Leach, C.J.

As indicated by Venkataramana Rao, J., in his judgment the decision of the Calcutta High Court in In re *Belvedere Jute Mills, Ltd.*1, which was followed by this Court in *The Hindu Religious Endowments Board, Madras* v. *The Shirur Mutt*2, has direct bearing on the question under discussion. The Calcutta case had reference to the execution of award under S. 15 of the Indian Arbitration Act, which says that where an award has been filed in Court it shall (unless the Court remits it to the reconsideration of the arbitrators or umpire or sets it aside) be enforceable as if it were a decree of the Court. It was held that Art. 182 and not Art. 181 applied. Rankin, C.J., remarked:

"If one looks at the question of limitation from the point of view of the different alternatives, there can be one inference only and that is that the words employed by the Legislature in the first sub-section of S. 15 of the Indian Arbitration Act were intended to go to the question of limitation as well as to the question of procedure."

There is no difference here between S. 15 of the Indian Arbitration Act and r. 15 (7) (*c*) of the Co-operative Societies Act and as In re *Belvedere Jute Mills, Ltd.*1 has been accepted by a Bench of this Court as embodying the correct statement of the law it decides the matter.

The appeal will be dismissed with costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

K. Dasaradharama Reddy .. *Petitioner** (*Creditor*)

v.

Syed Rahimtulla Hussani and another .. *Respondents* (*Petitioners*).

Dasaradharama Reddy v. Rahimtulla Hussani.

Debt Conciliation Act (XI of 1936), S. 4 (1)—Insolvent applying without consent of Insolvency Court to Debt Conciliation Board—Jurisdiction of Board to entertain application—Proceedings to be quashed—Provincial Insolvency Act (V of 1920), S. 28 (2).

The Debt Conciliation Board has no jurisdiction to accept the petition of an applicant under S. 4 (1) of the Act of 1936, when the applicant is an insolvent whose estate has vested in the Official Receiver.

The position will be the same whether the application to the Debt Conciliation Board is made by the insolvent or by a creditor. An insolvency takes away the jurisdiction of the Debt Conciliation Board and no application

1. (1927) I.L.R. 55 Cal. 499.
2. (1934) 68 M.L.J. 200: I.L.R. 58 Mad. 760.

* C.M.P. No. 2270 of 1939. 15th December, 1939.

will lie without the previous consent of the Insolvency Court under S. 28 (2) of the Provincial Insolvency Act.

Dasaradharama Reddy *v.* Rahimtulla Hussani.

Venkayya v. *Sambayya*, (1938) 2 M.L.J. 93, relied on.

Petition praying that in the circumstances stated therein the High Court will be pleased to issue a writ of *certiorari* calling for records in A.P.P. No. 47 of 1938 on the file of the Debt Conciliation Board, Nellore and to quash the proceedings therein dated 13th December, 1938, preferred therefrom to the High Court.

P. Chandra Reddi for Petitioner.

The Government Pleader for the Government.

The Order of the Court was made by

Leach, C.J.

The Chief Justice.—The rule *nisi* must be made absolute. The respondent Board has entirely misconceived the law. On the 15th March, 1935, one Rahimtulla Hussani was adjudicated in the Court of the Subordinate Judge of Nellore. On the 28th June, 1935, he filed an application to the respondent Board for settlement of his debts under S. 4 (1) of the Madras Debt Conciliation Act, 1936. The applicant had not obtained his discharge and is still an insolvent. The petitioner objected to the Board entertaining the application on the ground that the applicant's estate had vested in the Official Receiver. The leave of the Insolvency Court had not been obtained for the filing of the petition and the Official Receiver was not a party to it. Thereupon, the Board directed notice to be issued to the Official Receiver who replied that he could not be made a party to the application as the applicant had not obtained the consent of the Insolvency Court.

The Board overruled the objection and refused to accept the decision of this Court in *Venkayya* v. *Sambayya*[1], which was in point. In that case Pandrang Row, J., held that an application to a Debt Conciliation Board when the debtor was an insolvent and the Insolvency Court had not given its consent was in direct contravention of S. 28 (2) of the Provincial Insolvency Act. The applicant happened to be a creditor and the respondent Board considered that that made all the difference. This is an opinion which certainly cannot be accepted. The position is the same whether the application to the Debt Conciliation Board is made by the insolvent or by a creditor. The debtor's estate has become vested in the Official

1. (1938) 2 M.L.J. 93.

Dasaradharama Reddy v. Rahimtulla Hussani.

Leach, C.J.

Receiver and the Provincial Insolvency Act requires that it shall be administered by the Insolvency Court. An insolvency takes away the jurisdiction of the Debt Conciliation Board.

The order of the Board contains other statements which are equally open to objection but it is not necessary to discuss them. It is sufficient to say that in the circumstances the Board had no jurisdiction to accept the petition and the proceedings must be quashed. The petitioner is entitled to his costs and we fix the Advocate's fee at Rs. 50.

K. C. ——— *Rule nisi made absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Ayancheri Kovilagath Sankara Varma Rajah .. *Petitioner** (*Accused*).

Sankara Varma Rajah, *In re.*

Indian Penal Code (XLV of 1860), S. 175—Failure of defendant in civil suit to produce certain records—Complaint under Criminal Procedure Code, S. 482—Competency.

After refusal by Court to sanction a complaint under S. 476 a complaint under S. 482, Criminal Procedure Code, was filed for failure by a defendant in a civil suit to produce certain documents.

Held, an offence under S. 175, Indian Penal Code, cannot be said to have been committed in the view or presence of the District Court and the complaint was not competent.

Queen-Empress v. *Seshayya,* (1889) I.L.R. 13 Mad. 24, referred.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the District Court of North Malabar dated 15th April, 1939, initiating proceedings under S. 482 of the Code of Criminal Procedure against the petitioner-first defendant in O. S. No. 5 of 1938 on his file.

D. A. Krishna Variar and *M. C. Sridharan* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner was the first defendant in O. S. No. 12 of 1937 on the file of the Sub-Court of Tellicherry and on the application of the plaintiff an order was passed by the Subordinate Judge on 15th October, 1938, directing the defendants to produce certain records by 21st October, 1938, or file an affidavit if they were not available. The order was not complied with, and the Subordinate Judge closed the application with the following order:

* Crl R. C. No 879 of 1939. (Crl. R. P. No. 827 of 1939). 26th October, 1939.

"It is to be regretted that the defendants have not complied with the order and the plaintiff may take such steps as he may find necessary"

Sankara Varma Rajah, *In re.*

An application under S. 476 of the Code of Criminal Procedure was made to the Subordinate Judge on 8th November to file a complaint against the defendants for an offence under S. 175, Indian Penal Code, and some documents were filed by the petitioner on 18th November with an application to excuse his failure to produce them earlier. The documents were ordered to be received on 26th November after notice to the plaintiff, and the Sub-Court was abolished on 23rd December, 1938. The application under S. 476 of the Code of Criminal Procedure was transferred to the District Court and it was dismissed on the 15th April, 1939, on the ground that S. 476 of the Criminal Procedure Code was not applicable. But a complaint was made under S. 482 of the Criminal Procedure Code and the question is whether this complaint is competent. The District Court did not order the production of any document nor, as pointed out in *Queen-Empress* v. *Seshayya*[1] can the alleged offence under S. 175, Indian Penal Code, be said to have been committed in the view or presence of the District Court. The Revision Petition is therefore allowed and the complaint will be withdrawn.

K. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KUNHI RAMAN.

In the matter of the last Will of Hajee Sir Ismail Sait, Kt., late of Essex Lodge, Spencer Road, Civil and Military Station, Bangalore Millowner, Exporter and Importer now deceased.

Abdul Hameed .. *Appellant* (Defendant)*

v.

Mohammad Yoonus (Petitioner) Merchant and Company Director, and others .. *Respondents (Petitioner-Plaintiff).*

Abdul Hameed *v.* Mohammad Yoonus.

Muhammadan Law—Wills and codicils—Mode of creating—Telegram and letter from testator to solicitors to alter draft of codicil—Death of testator—Telegram and letter if amounts to an effective codicil.

1. (1889) I.L.R. 13 Mad. 24.

* O. S. A. No. 14 of 1938. 5th September, 1939.

Abdul Hameed v. Mohammad Yoonus.

The testator, a Cutchi Memon having decided to make certain alterations in his will and after having received the draft codicil instructed his solicitors to amend it by inserting a provision cancelling the directions he had given in his will with regard to the school fees of his grandchildren. He wrote: "I . . . . . have decided to cancel the allowances provided for school fees" and sent a telegram also couched in language equally clear. After that the testator became too ill to attend to his affairs and died without executing the codicil. The executor applied for probate of the will and asked that the telegram and the letter should be read as part of the will and admitted to probate.

Held [reversing the decision of Wadsworth, J., in *Mahomed Yoonus* v. *Abdur Sattar Ismail*, (1938) 1 M.L.J. 444] the letter and the telegram cannot be regarded merely as instructions for the preparation of a draft codicil. The testator had made up his mind as to what was to be done and the telegram and letter should be admitted to probate. Under the Muhammadan Law no writing is required to make a will valid and no particular form even of verbal declaration is necessary.

Mazhar Husain v. *Bodha Bibi*, (1898) L. R. 25 I. A. 219: I. L. R. 21 All. 91 (P.C.) and *Sarabai Amibai* v. *Mahomed Cassum Haji*, (1918) I. L. R. 43 Bom. 641, followed.

On appeal from the judgment of the Hon'ble Mr. Justice Wadsworth* dated 15th December, 1937 and 17th December, 1937 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O. P. No. 150 of 1935.

P. K. Janakiram for Appellant.

V. Radhakrishnayya instructed by *King and Partridge* for 1st Respondent.

S. Panchapakesa Sastri instructed by *T. A. Rangachari* for 2nd Respondent.

V. Subramanyam, *V. Satyanarayana* and *D. Narasaraju* for other Respondents.

The Court delivered the following

Leach, C. J.

JUDGMENTS. *The Chief Justice.*—Hajee Sir Ismail Sait, a member of the Cutchi Memon community and a resident of Bangalore, died on the 24th April, 1934, in the tuberculosis sanitorium at Arogyavaram, Chittoor District. He was survived by a widow, five sons (the appellant and respondents 1 to 4) and a daughter (the fifth respondent). He had sixteen grandchildren, who are respondents 6 to 21. He left a will dated 19th March, 1934, and the present appeal arises out of an application which was made by the executor for the grant of probate. By his will the testator provided for the education of his grandsons. For some of them he made special provisions with regard to their education and maintenance. While he was in the Sanitorium he

* (1938) 1 M.L.J. 444.

decided to fix the allowance which his sons and daughter were to receive under his will and he directed his solicitors, Messrs. Moresby and Thomas, Madras, to draw up a codicil to give effect to his intentions in this respect. The instructions to draft the codicil were embodied in a letter dated the 5th April, 1934 and signed on the testator's behalf by the first respondent. Messrs. Moresby and Thomas prepared a draft and sent it to him on the 6th April. Two of the testator's grandchildren had been at school at Aligarh. One died while at school and the other was consequently withdrawn from the school. On the 13th April, 1934, the testator directed the first respondent and his agent D. L. Narasappa to write to Messrs. Moresby and Thomas in these terms:—

"I beg to acknowledge the receipt of your letter of the 6th instant with the draft codicil. I am grieved to inform you that since the receipt of this codicil my grandson, Abdul Sammad, suddenly died at Aligarh University. I have withdrawn my other grandson from school and have decided to cancel the allowances provided for school fees. I have, therefore, wired you as under: 'Your letter sixth since my grandson Abdul Sammad died have therefore decided omit also school fees—Don't delay—Ismail' which I beg to confirm."

The first respondent who applied for probate of the will also asked that the telegram referred to in this letter and the letter should be read as parts of the will and admitted to probate. The learned Judge who heard the application (Wadsworth, J.) granted probate of the will, but refused to admit to probate the telegram and the letter. The appeal concerns the question whether this decision is right. The refusal of the learned Judge to admit these documents to probate was based on the opinion which he formed that they were only intended to provide material for the preparation of a draft codicil which the testator was to settle later.

Although according to the oral evidence the testator was in clear mind until two days before he died, he was undoubtedly seriously ill when he instructed the first respondent and his agent to write to Messrs. Moresby and Thomas on the 13th April, 1934, and from the documentary evidence it is quite evident that soon afterwards he became too ill to attend to his affairs. On the 14th April Messrs. Moresby and Thomas wrote to him acknowledging receipt of his telegram instructing them to omit from the will the provisions made for school fees but asked for further instructions in order to clear up a doubt which they felt with regard to the extent of the instructions. By

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cl. 14 (*a*) of the will the testator provided for the maintenance and education of the five sons of the second respondent, including provision for the pursuit of studies in England or America. In cl. (*b*) he made a similar provision for the education of any sons who might subsequently be born to the second respondent, and in cl. (*f*) he made provision for the education and maintenance of Sulaiman, the son of the appellant. Sulaiman was then reading for the Bar in England. In their letter asking for further instructions Messrs. Moresby and Thomas referred to the fact that Sulaiman was in England and observed that probably the testator did not wish to make any alteration in the clause relating to him but they would be glad to know by return whether he wished them to strike out from the will cls. 14 (*a*) and 14 (*b*). In addition to writing this letter Messrs. Moresby and Thomas sent him a telegram asking for instructions. The telegram and the letter were not replied to and it is obvious that this was because the testator was too ill to give instructions. On the 12th April Messrs. Moresby and Thomas submitted a bill of costs to the testator and on the 21st April the first respondent wrote to them stating that his father was not well enough to go through their letter in consequence of which it had not been placed before him.

The testator being a Cutchi Memon the provisions of the Muhammadan Law with regard to wills apply. That a Cutchi Memon is governed by the Muhammadan Law in this respect was held in *Sarabai Amibai* v. *Mahomed Cassum Haji*[1] and the contesting respondents have not disputed the correctness of the decision. It is also accepted, as it must be, having been accepted by the Judicial Committee, that by the Muhammadan Law no writing is required to make a will valid and no particular form even of verbal declaration is necessary as long as the intention of the testator is sufficiently ascertained, see *Mahomed Altaf Ali Khan* v. *Ahmed Buksh*[2]. The appellant says that the telegram and the letter which he asks to be admitted to probate embody a definite decision by the testator that the provisions which he had made in his will with regard to school fees should be cancelled. If that is the position there can be no doubt that the telegram and the letter should be admitted to probate. The contesting respondents, however, say that the learned Judge was correct in treating the telegram and

1. (1918) I.L.R. 43 Bom. 641. 2. (1876) 25 W.R. 121.

the letter as being material for the preparation of a draft and that the testator left open the definite position until the draft had been submitted to him.

The case of *Sarabai Amibai* v. *Mahomed Cassum Haji*[1] has direct bearing on this appeal. In that case a Cutchi Memon wrote to his brother-in-law, Bhai Abdullabhai, as follows:—

"In the will which you will get made to-morrow and give me, be kind not to forget (to add) my 'Mukhatyari' as long as I am alive and after me my wife's 'Mukhatyari.' Whatever costs may be incurred I will pay you. Written by your servant. Mahomed Hasam Haji."

On the other side of this document were the words "Bhai Abdullabhai" the name of the brother-in-law. "Mukhatyari" means absolute ownership or full power. The document was unattested. The intention was that the brother-in-law should instruct a solicitor to draw up a will embodying the intentions of the deceased. It was held that the document was in the nature of instructions to his legal adviser with regard to the disposition of his property and that under Muhammadan Law the document operated as a valid will which might be admitted to probate. The deceased died before the will was drawn up. Marten, J., cited with approval the following statement from Mayne's Hindu Law, 8th edition, page 588:—

"So, a paper drawn up in accordance with the instructions of the testator, and assented to by him, will be a good will, though not signed. And if a paper contains the testamentary wishes of the deceased, its form is immaterial."

He also referred to the case of *Mahomed Altaf Ali Khan* v. *Ahmed Buksh*[2]. In that case the Privy Council held that a document which was a power of attorney containing an expression of what was to be done with property after the death of the donor of the power operated as a will. In *Mashar Husain* v. *Bodha Bibi*[3], the Privy Council held that a letter operated as a will. The letter contained this statement:

"You should not have the property given to (my) grandmother and paternal uncle's wife, but you should give the whole to my three sisters, who are my paternal uncle's daughters. You should see that they all get an equal share, and in the same manner as stated by me in paragraph 3."

The letter was addressed to the writer's agent.

Now what is the position here? The testator having decided to make certain alterations in his will and after having received the draft codicil instructed his solicitors to amend it by inserting a provision cancelling the directions he had given in

1. (1918) I.L.R. 43 Bom. 641. 2. (1876) 25 W.R. 121.
3. (1898) L.R. 25 I.A. 219: I.L.R. 21 All. 91 (P.C.).

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his will with regard to the school fees of his grandchildren. He wrote:

"I . . . . have decided to cancel the allowances provided for school fees"

and sent a telegram also couched in language equally clear. The testator had made up his mind as to what was to be done and he gave definite instructions to this end. The fact that the solicitors were not certain whether the instructions affected the grandson who was studying for the Bar in England did not alter the nature of the instructions. In these circumstances the letter and the telegram cannot be regarded as being instructions to the solicitors to submit a draft the provisions of which were to be deemed to be merely tentative. The learned Judge formed the opinion that the letter and the telegram were instructions merely for the preparation of a draft codicil which the testator would settle after perusal, but there is no evidence to be found in support of this. I can see no difference in principle between this case and the case of *Sarabai Amibai* v. *Mahomed Cassum Haji*[1] and I accept the judgment in that case as correctly deciding the question under discussion.

For the reasons indicated I consider that the appeal should be allowed and the telegram and the letter admitted to probate. It is not necessary to inquire what will be the effect of admitting these documents to probate. That question will be decided if and when it arises in proper proceedings. The costs of all the parties who have appeared before us will be paid out of the estate, but not on the advocate and client basis.

Kunhi Raman, J.

Kunhi Raman, J.:—I agree with my Lord.

K. S. —— *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT:—LORD THANKERTON, LORD ROMER AND SIR GEORGE RANKIN.

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Lala Ram Sarup .. *Appellant**

v.

The Court of Wards, through the Deputy Commissioner, Delhi, and others .. *Respondents.*

Agreement to finance litigation and to receive share of property if recovered—Tests of fairness of agreement—Action successful—Refusal to

1. (1918) I.L.R. 43 Bom. 641.

* P. C. Appeal No. 26 of 1939. 7th November, 1939.

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give share of property to financier according to agreement—Limitation—Time whether runs from date of decree or from date of refusal to perform agreement.

S wished to establish his legitimacy as the son of a man who had died in 1913 possessed of considerable property and leaving him surviving two widows and two daughters. The Court of Wards took control of the whole estate as belonging to the deceased's female heirs, leaving it to *S* to obtain the decision of a Civil Court as to his status. *S*, being without sufficient means to prosecute his case, made an agreement, duly registered, with the plaintiffs, who were moneylenders, whereby, in return for their paying the expenses of the litigation, they were to receive a share of the immovable properties, if any, recovered. The litigation having resulted in the award to *S* of a share of the deceased's immovable properties, and *S* having died, his widow and daughter and the Court of Wards disputed the plaintiffs' claim under their agreement with *S*, whereupon the plaintiffs more than three years after the decree in *S's* favour, brought an action to enforce the agreement. *S's* suit involved difficulties arising on his father's will and proving a custom derogating from the rules of Muhammadan succession.

Held, in applying the principle laid down in *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*, (1876) L.R. 4 I.A. 23 at 47: I.L.R. 2 Cal. 233 (P.C.) [that a fair agreement to supply funds to carry on a suit in consideration of having a share in the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy], it is essential to have regard not merely to the value of the property claimed, but to the commercial value of the *claim*. In as much as that has to be estimated in advance of the result cases where the parties have weighed the probabilities in a manner which has not operated unfairly should rather be regarded as confirming their shrewd estimate of the chances than that the agreement should be condemned outright as unfair by reason only of the possibility that a great gain to the claimant would have had to be shared with the financier. Though it is not conclusive, the proportion to be retained by the claimant is, however, an important matter for consideration, when judging of the fairness of a bargain made at a time when the result of the litigation is problematical.

Held, further, (1) that the action was not barred by limitation as the three-year period began to run not from the date of *S's* decree but from the date when the defendants refused performance of the plaintiffs' agreement with *S*. *S's* obligation not being to have the property valued and the plaintiffs' share transferred to them on the day of the decree, that date could not be taken as that from which time should begin to run;

(2) that even if (which was not the case) the value of the property recovered by *S* had been such that the plaintiffs' share greatly exceeded the amount of their expenditure, yet the agreement would be fair and enforceable in view of the difficulties with which *S* was faced in his action.

Appeal from a decree of the High Court, Lahore, dated 18th March, 1937 (*Abdul Rashid* and *Coldstream, JJ.*) reversing a decree of the Sub-Judge, First Class, Delhi, dated 30th October, 1935.

The plaintiffs, Lala Alopi Prashad and Lala Ram Sarup, agreed to lend one Saleem Mahomed Shah, the money necessary to enable him to establish in legal proceedings his legitimacy as the son of

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Shaksada Mirja Souriya Jah of the Mogul dynasty who had died in 1913 possessed of considerable property. Saleem having succeeded in his proceedings and subsequently died, his widow and daughter refused to satisfy the plaintiffs' claim under their agreement with Saleem, whereupon they brought the present action. The Sub-Judge held in favour of the plaintiffs on the merits, but decided that the action was barred by limitation. The High Court held in favour of the plaintiffs on the question of limitation, but dismissed the appeal on the ground that the agreement was inequitable and detrimental to Saleem's interests. The plaintiffs appealed to His Majesty in Council.

J. P. Eddy, K. C. and *A. P. Pennell,* for the Appellants, referred to the following cases, arguing that the burden was on the defendants of proving that the agreement between *S*, and the plaintiffs was unfair, and that they had failed to discharge it. *Raja Muthu Ramalinga Setupati* v. *Perianayagam Pillai*[1], *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*[2], *Kunwar Ram Lal* v. *Nil Kanth*[3], *Lal Achal Ram* v. *Raja Kasim Hussain Khan*[4], *Raja Rai Bhagwat Dayal Singh* v. *Debi Dayal Sahu*[5] and *Indar Singh* v. *Munshi*[6], were referred.

Wallach, for the Respondents, referred to *Raja Mokham Singh* v. *Raja Rup Singh*[7] and *Chunni Kuar* v. *Rup Singh*[8].

Cur. Adv. vult.

7th November, 1939. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—The appellant Lala Ram Sarup and respondent No. 4, Lala Alopi Parshad (herein called the plaintiffs), brought the suit out of which this appeal arises in the Court of the District Judge at Delhi on 16th October, 1928. The suit was brought upon an agreement of a champertous nature dated 2nd October, 1920, and made between the plaintiffs and one Saleem Mahomed Shah. Saleem had since 26th January, 1920, been suing in the Court of the District Judge at Delhi to establish his legitimacy as son to Shahzada Mirza Souriya Jah of the Moghul dynasty, who had died in 1913 possessed of considerable property. Besides Saleem, Souriya had left him surviving two widows and two daughters. The Court of Wards had in 1913 taken over his whole estate as

1. (1874) L.R. 1 I A. 209 (P. C.).
2. (1876) L.R. 4 I.A. 23: I L.R. 2 Cal. 233 (P.C.).
3. (1893) L.R. 20 I.A. 112: I.L R. 20 Cal. 843 (P C.).
4. (1904) 15 M L J. 197: L R. 32 I.A. 113: I.L R 27 All 271 (P.C.).
5. (1907) 18 M L J. 100: L R. 35 I.A. 48: I.L R. 35 Cal. 420 (P.C.).
6. (1919) I.L R. 1 Lah. 124.
7. (1893) L.R. 20 I.A 127 at 136: I.L.R 15 All. 352 (P. C.).
8. (1888) I L.R. 11 All. 57.

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belonging to these female heirs, giving a compassionate allowance to Saleem as a temporary measure. It had been decided by the Chief Commissioner that the Court of Wards should not upon its own responsibility recognise Saleem as entitled to succeed to any portion of the estate, but that he should be invited to obtain the decision of a Civil Court, and informed that the Court of Wards would give all possible aid to the Civil Courts in order to arrive at an early decision with the least possible cost to the litigants. His application for a loan was not unnaturally refused by the Court of Wards; who gave him instead some inexpert advice about bringing a friendly suit for a mere declaratory decree on a court-fee of ten rupees and about suing *in forma pauperis*. By June, 1919, he had approached a Muslim lawyer of Delhi by name Abdur Rahman. This gentleman was a Khan Bahadur and has since become a Knight and a judge of the High Court of Madras. Having made an arrangement with Saleem to take a fee payable by monthly instalments of Rs. 100, he undertook the case and acted for Saleem throughout. On 26th January, 1920, Saleem attempted to proceed *in forma pauperis* by filing an application under O. 33, Civil Procedure Code, containing the same particulars as a plaint. He impleaded the Court of Wards, his father's junior widow and daughter and the husband of a deceased daughter. The senior widow had died in 1919. Two schedules (P. 1 and P. 2) were annexed to the application being lists of the movable and immovable property left by Souriya according to such information as Saleem had been able to obtain. P. 2 comprised a considerable number of immovable properties some of which had been held by Souriya as jagirs and were not heritable. The claim was for possession or administration of the whole movable and immovable property left by Souriya on the footing that by a family custom overriding the Mahomedan Law Saleem as the only son was the sole heir. He asked for mesne profits, accounts and enquiries and other relief and valued his suit at ten lacs of rupees. The Court of Wards did not, however, fulfil the expectations which it had held out as regards facilitating an early decision in a friendly and inexpensive suit. Mr. Modad Ali, its manager, opposed the grant of leave to sue *in forma pauperis* on a number of grounds, with the result that the Subordinate Judge on 7th April, 1920, framed four issues and adjourned the case till 3rd August, 1920, for evidence and arguments on the question

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whether leave should be given. When August came, Saleem, despairing of progress along these lines, had got into touch with respondent No. 4, Alopi Parshad, who at that time (and until 1923) carried on business with the appellant, Ram Sarup, as moneylenders and bankers. Saleem succeeded in arranging that they should find the money to pay the court-fee (Rs. 3,000) so that his suit should proceed in the ordinary way and not *in forma pauperis*, and also that they should meet all the expenses of the litigation. Mr. Abdur Rahman on 27th August, 1920, applied to the Court and obtained leave to put in the court-fee by 4th October. The money was paid into the Treasury on 2nd October and on the 8th October the Court made an order treating the application made under O. 33 as a plaint.

The agreement for finance (which is now sued upon) is a registered instrument dated 2nd October. It recites that Saleem had only an allowance of Rs. 100 per month, that he had filed a case *in forma pauperis*, and that it could not be quickly or satisfactorily conducted in that way. A long list of immovable properties is attached to the agreement: it is said to be in the same terms as the list attached to the application under O. 33. The agreement provides that the financiers, the present plaintiffs, should bear all the expenses of the case and in return therefor should get a three annas share of the immovable property recovered, provided that this should be increased to four annas should the case be taken on appeal to the Privy Council. It was to be in Saleem's option either (*a*) to have the property partitioned and give the plaintiffs their share or (*b*) to have the property valued and pay the plaintiffs in cash.

It is not disputed that the plaintiffs carried out their part of the agreement, providing whatever money was required of them; such monies as had previously been raised by Saleem and paid to Mr. Abdur Rahman being refunded out of the sums provided by the plaintiffs.

The suit was decided by the Subordinate Judge on 10th May, 1925. By his judgment of that date he disposed of a large number of issues which had apparently been argued before him for sixteen days. He found that Saleem was the legitimate son of Souriya; that a document put forward as Souriya's will was not proved and was otherwise invalid; that the alleged family custom of succession excluding females was not proved; and that the succession to the property of Souriya was governed by the rules of Mahomedan law, so that Saleem

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was entitled to a 14/32nds share and no more. As regards the immovable property of Souriya he found that there was hardly any dispute, the Court of Wards having filed two lists at Saleem's instance; but the record before their Lordships in the present appeal does not enable them to say what properties were held to have descended to the heirs of Souriya. He found that the claim in respect of movables was barred by limitation except as regards any movables which came to the hands of the Court of Wards. He thought it unnecessary to direct accounts or administration as the property was under management by the Court of Wards, and he confined his decree to a direction in Saleem's favour "for possession of 14/32nds share of the estate of his late father." From this decree neither side, upon consideration, thought fit to bring an appeal.

In consequence of the decision, the Court of Wards on 16th July, 1925, was placed in charge of Saleem's share with retrospective effect on the ground that he was a co-sharer with female wards. Soon afterwards, on 17th September, 1925, Saleem died leaving a widow and a daughter (defendants 2 and 3 in the present suit). As neither these ladies nor the Court of Wards were willing to recognise the plaintiffs' claim under the agreement of 2nd October, 1920, the present suit was brought against them on 16th October, 1928, asking for a decree for possession of 21/256ths share in the immovable properties belonging to Souriya's estate, and for partition thereof, as well as for mesne profits since 10th May, 1925. The plaintiffs, Ram Sarup and Alopi Parshad, gave evidence and called on their behalf Mr. Abdur Rahman. For the defendants, Mr. Modad Ali, manager of the Court of Wards, Saleem's widow and a collateral relation of his called Nazir-ud-din were the main witnesses. The learned Subordinate Judge (30th October, 1935) held that the plaintiffs' claim being a claim for specific performance of an agreement was by virtue of article 113 of the schedule to the Limitation Act of 1908 barred as having been brought in October, 1928, more than three years from the date of the decree of 10th May, 1925. But he found in the plaintiffs' favour that Saleem was not of weak intellect, that the agreement of October, 1920, was executed by him of his own free will, and that the agreement was not unlawful nor opposed to public policy. The High Court on appeal (10th June, 1937) reversed the trial court's decision as

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to limitation, holding that time did not begin to run against the plaintiffs on the date of the decree of 10th May, 1925, but only when the plaintiffs had notice that performance was refused. But the learned judges having referred to the evidence as to Saleem's being given to drink and being of weak intellect held that it was "highly probable that Saleem Mohammad Shah was induced to enter into an unfair bargain whereby he agreed to give up property worth a lac and fifty thousand rupees for a sum of ten or twelve thousand rupees". They held that the agreement of 2nd October, 1920, was highly detrimental to his interests and was inequitable and unenforceable. They assessed the reasonable expenses of Saleem's suit at Rs. 8,440 and gave the plaintiffs a decree for that sum, refusing them any costs on the ground that the Court of Wards had offered Rs. 8,500 before the suit was filed.

Upon the question of limitation their Lordships agree with the High Court that Saleem's obligation under the agreement sued upon was not that on the same day as that on which the trial Court should give judgment he should get the property partitioned or valued and should transfer the plaintiff's share of the lands or pay the plaintiffs the value thereof in cash. The 10th May, 1925, cannot be regarded as the date fixed for the performance of the agreement of 2nd October, 1920.

On the merits, however, their Lordships consider that the High Court have taken an unduly unfavourable view of the agreement, which was neither extortionate nor inequitable. There is some dispute as to the amount of money found by the plaintiffs for the purposes of Saleem's suit. The plaintiffs produce four cheques amounting to Rs. 19,000 which were paid by them to Mr. Abdur Rahman and are dated 23rd August, 1920 (Rs. 5,000), 13th January, 1921 (Rs. 500), 21st February, 1921 (Rs. 10,000), and 6th June, 1921 (Rs. 3,500). Both they and Mr. Abdur Rahman deposed that these cheques were all given for the expenses of the suit. The latter says that by January, 1920, he had agreed with Saleem for an inclusive fee of Rs. 10,000 to be paid in monthly instalments of Rs. 100. The widow and Nazir-ud-din say that the fee agreed on was Rs. 2,000, but the trial Judge thought that there was "no reason to disbelieve the statement of Sir Abdur Rahman that his fee was Rs. 10,000". The learned judges of the High Court do not say that they disbelieve the statement but

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express the opinion that a fee of Rs. 10,000 was highly excessive. The plaintiffs cannot be held responsible for fixing the fee, which had been settled before they were approached, and their Lordships think it sufficiently proved that the fee was paid by the plaintiffs. The learned Subordinate Judge was satisfied that "about Rs. 10,000 in all must have been spent on carrying on the litigation by the plaintiffs," but as there was a junior counsel and some expense upon commissions to examine witnesses it seems reasonably clear that the expenditure exceeded that figure by several thousands of rupees. According to Sir Abdur Rahman he got the money from the plaintiffs' cheques and used it all for the suit; giving money to Saleem, who kept an account of his expenditure which he showed to Sir Abdur's clerk and himself when asking for more money. It seems quite probable therefore that the whole Rs. 19,000 was expended in this manner, and had the case gone on appeal to the High Court further moneys to a considerable amount might have become necessary. What then in the events that have happened has been the plaintiffs' reward? It is now admitted that, as the Court of Wards accounts show, the total value of Saleem's share of his father's estate is Rs. 88,753 of which three-sixteenths is Rs. 16,641. So that the plaintiffs have got a poor return for their venture if indeed they have not actually lost money by it. The trial judge on a review of these matters held that the agreement sued on was neither unlawful nor opposed to public policy and their Lordships agree. The learned judges of the High Court based a contrary opinion mainly upon the statement of Alopi Parshad that he had seen the properties in Delhi which were mentioned in the agreement; and could approximately assess the value of those outside the city; and that he estimated the value of them all, including the jagirs, at about eight lacs of rupees. Mr. Modad Ali, the Court of Wards' manager, deposed, "The value of the property was fixed by the plaintiff (that is, Saleem) as ten lacs in which he claimed his own share, but the value of the whole property in fact was about three lacs". The learned judges of the High Court taking three-sixteenths of eight lacs as Rs. 1,50,000 say that by the agreement in suit Saleem "agreed to give up property worth a lac and fifty thousand rupees for a sum of ten or twelve thousand rupees". This, their Lordships think, is to mistake the business meaning of the transaction. Though the Court of

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Wards was not minded to accept Saleem as Souriya's legitimate son, he had, and was thought by his lawyer and by the plaintiffs to have, a good chance of establishing his legitimacy. Even so, he had certain difficulties to overcome, for example, as regards the alleged will of Souriya. But beyond that lay a great difficulty—that of proving a custom, in derogation of the rules of Mahomedan succession, whereby he could succeed to the whole estate. On this point he would indeed appear to have had little chance of success. To speak of the plaintiffs as though they were having three-sixteenths of eight lacs handed to them for ten or twelve thousand rupees is therefore a serious mistake. But in truth the figure of eight lacs refers in part to property which was not heritable at all, and takes no account of any mortgages or charges, still less of any question as to debts left by Souriya. The shrinkage in the value of Saleem's inheritance to the figure of Rs. 88,753 may be due in part to a fall in values not expected in October, 1920; but even that is not a contingency too remote to be taken into account by business men striking a bargain for the finance of a suit to recover immovable property. The High Court's conclusion appears to have been influenced by the evidence that Saleem was given to drink and of weak intellect. This they regard as rendering it "probable that he was induced to enter into an unfair bargain." But there is no evidence that the agreement sued upon was entered into by him while under the influence of drink and much to show that he took a long time to consider it, consulted with his wife and his lawyer and fully understood it. The evidence that he was of weak intellect is very thin indeed, and Sir Abdur Rahman denied this though he admitted that Saleem was occasionally intoxicated. The trial judge had very correctly dealt with the evidence upon this aspect of the case and had found against the contentions of the defendants, which the High Court appear to have accepted on the ground that they were "highly probable". The fairness of the agreement of 2nd October, 1920, must be considered independently of unproved suggestions that it may have been improperly obtained.

Champertous transactions are in their essence speculative and the fairness or otherwise of a particular bargain is almost always open to some debate. Saleem was a poor man with a reasonable and, as it turned out, a just claim. He was put by the Court of Wards in the position of having to undertake

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expensive litigation. He was well justified in his own interest in resorting for finance to persons willing to take a risk; and the plaintiffs were *prima facie* justified in helping him to his rights upon terms that they would share in his good fortune if he succeeded and lose their money if he failed. Not only is there no proof to support the suggestion that the agreement of 2nd October, 1920, was obtained by unfair means or was not fully considered by Saleem and freely accepted by him, but in the events which have happened it appears that, after taking all risks of the suit being unsuccessful, the plaintiffs notwithstanding that it succeeded are likely—to put it no higher—to gain little or nothing by the transaction. Had the suit succeeded in all respects the plaintiffs' reward would doubtless have been high but Saleem would have become a rich man retaining thirteen annas in the rupee. In applying the principle that "a fair agreement to supply funds to carry on a suit in consideration of having a share in the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy" (*Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*[1]), it is essential to have regard not merely to the value of the property claimed but to the commercial value of the *claim*. This has to be estimated by the parties in advance of the result; and where they have weighed the probabilities in a manner which has not operated unfairly, it is more reasonable to regard this as confirming their shrewd estimate of the chances, than to condemn the agreement outright as unfair, by reason only of the possibility that a great gain to the claimant would have had to be shared with the financier. Though it is clearly not conclusive, the proportion to be retained by the claimant is an important matter to be considered when judging of the fairness of a bargain made at a time when the result of the litigation is problematical. The uncertainties of litigation are proverbial; and if the financier must needs risk losing his money he may well be allowed some chance of exceptional advantage. Their Lordships agree with the trial judge in thinking that the agreement of 2nd October, 1920, is valid and binding.

The order to be made on this appeal should, in their Lordships' opinion, direct that the appeal be allowed, and the decree of the High Court dated 18th March, 1937, set aside; declare that the agreement dated 2nd October, 1920, should be

1. (1876) L.R. 4 I.A. 23 at 47: I.L.R. 2 Cal. 233 (P.C.).

P.C.

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specifically performed; that the defendants should be permitted to elect whether to have a valuation of such of the properties mentioned in the said agreement as were recovered by Saleem Mahomed Shah in Suit No. 235/127 of 1920-22 in the Court of the Senior Subordinate Judge at Delhi and to pay three-sixteenths of such value to the plaintiffs, or to have a partition thereof; that the present suit should be remanded to the trial Court for further consideration in accordance with these directions and such other directions in that behalf as the High Court may think fit to give, having regard to the fact that some of the said properties are under management by the Court of Wards. Their Lordships will humbly advise His Majesty accordingly. The defendants must pay the plaintiffs' costs in the trial Court and in the High Court as also the appellant's costs of this appeal.

Solicitors for Appellant: *Lambert & White.*

Solicitors for Respondents: *The Solicitor, India Office.*

R.C.C.

K. S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Meenakshi Ammal and another .. *Appellants** (*Appellants*)

v.

Murugayya Mooppanar .. *Respondent* (*Respondent-Defendant*).

Meenakshi Ammal v. Murugayya Mooppanar.

Hindu Law—Stridhanam—Succession—Illegitimate daughters of Hindu woman who was not a dancing girl—If entitled to succeed to stridhanam of her mother's mother.

The fact that Courts had recognised as between a mother and her illegitimate daughter the right of inheritance was no warrant for the extension of sapindaship to other relations. The illegitimate daughters of a daughter are not entitled to succeed to the stridhanam of their maternal grandmother.

Appeal under cl. 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Varadachariar dated 4th November, 1936 and passed in S. A. No. 1280 of 1932 preferred against the decree of the District Court of West Tanjore in A. S. No. 261 of 1931—O. S. No. 42 of 1931, District Munsif's Court, Tiruvadi.

* L. P. A. No. 29 of 1937. 8th November, 1939.

Meenakshi Ammal v. Murugayya Mooppanar.

Leach, C.J.

K. S. Desikan for Appellants.

S. Muthiah Mudaliar for Respondent.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—The question raised in this appeal is whether the illegitimate daughters of a Hindu woman are entitled to succeed to the *stridhanam* of their mother's mother, the family being governed by the ordinary Hindu Law and not by rules based on custom as in the case of dancing girls. The appellants are the illegitimate daughters of one Dharmu Ammal, who died on the 27th April, 1921. Dharmu Ammal was the legitimate daughter of one Murugayi Ammal, who left *stridhanam* property. The appellants' claim that under Hindu Law they are the nearest heirs of Murugayi, who was also survived by Venkatachalam Chetti, the grandson of her sister. It is common ground that if the appellants are not heirs of Murugayi the person entitled to the property is Venkatachalam.

The suit out of which this appeal arises was filed by the appellants in the Court of the District Munsif of Tiruvadi with the object of setting aside an alienation of immovable property forming part of Murugayi's *stridhanam*. The alienation was in favour of the respondent's predecessors-in-title and was made by Venkatachalam on the 20th July, 1910. The District Munsif accepted the appellants' contention that they were the heirs of Murugayi and decreed the suit, but his decision was reversed on appeal by the District Judge of West Tanjore. The appellants then appealed to this Court and their appeal was heard by Varadachariar, J., who confirmed the decree of the District Judge. Varadachariar, J., pointed out that the general principle of the Hindu Law was undoubtedly to limit heirship to legitimate issue, but in the case of illegitimate sons amongst Sudras a special exception had been made by the texts. The exception did not, however, extend beyond the illegitimate sons of Sudras. The fact that Courts had recognised as between a mother and her illegitimate daughter the right of inheritance was no warrant for the extension of sapindaship to other relations.

It has been argued on behalf of the appellant that the following paragraphs from the Mitakshara, Chapter II, S. 11, should be read as including both the legitimate and illegitimate daughters:

"(15) On failure of all the daughters, the daughters' daughters take, under this text, 'It will go to the daughters if she leaves progeny, etc.'

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(16) If there be a multitude of these (and if they be) children of different mothers, and unequal in number, shares should be allotted to them through their mothers, as directed by Gautama: 'Or, according to the mothers, let the special shares (be adjusted) in each case.'

(17) If there be daughters as well as daughters' daughters simultaneously, a trifle only should be given to the daughters' daughters. As has been directed by Manu: 'Such of the daughters of those (daughters) as may exist even to those, something should be given, as may be fit, from the property of the grandmother, on the score of affection.' "

This argument is expressly negatived by the decision of this Court (Oldfield and Seshagiri Aiyar, JJ.) in *Minakshi* v. *Muniandi Panikkar*[1]. Oldfield, J., observed :—

"It was then contended that references to 'daughters' in the Mitakshara should be read as including all daughters, both legitimate and illegitimate, and that all alike should be preferred to the legitimate son, as heirs to their mother. But, firstly, that is not the primary sense of those references and is unauthorised by the rules of interpretation recognised by both English and Hindu Law (vide *Bhimacharya* v. *Ramacharya*[2]). And next, it has not been shown how such a substitution can be carried out or logically limited, should it, for instance, be extended to the law relating to the daughter's right to inherit from the father, in spite of the absence of any special provisions in her favour, such as is available in the case of illegitimate sons?"

Seshagiri Aiyar, J., after referring to the text conferring a right of heirship on the illegitimate son of a Sudra, observed that illegitimate children have no place in Hindu Law when there are legitimate heirs at least under the Mitakshara system, except in the special case of the illegitimate son of a Sudra.

Before the ordinary rules of succession can be departed from in favour of illegitimate offspring there must be express authority to be found in the ancient texts or some statutory provision. It is conceded that the texts do not go beyond making provision in respect of an illegitimate son of a Sudra and the appellants are not able to rely on any statutory provision. With one exception, the cases which have been quoted to the Court have all had reference to the rights of the daughter, not the grand-daughter, to succeed. It is not disputed by the learned Advocate for the respondent that so far as the daughter is concerned she is entitled under the Hindu Law to succeed to her mother's property notwithstanding she is illegitimate. Of course, if there were also a legitimate daughter the illegitimate daughter would be postponed to the legitimate issue.

1. (1914) 27 M.L.J. 353 : I.L.R. 38 Mad. 1144.
2. (1909) I.L.R. 33 Bom. 452.

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The case which provides the exception is *Angammal* v. *Venkata Reddy*[1], where the question was whether the degradation of a daughter on account of her adultery put an end to her right to inherit the *stridhanam* property of her mother. It was held that because the daughter had been living in adultery she did not lose her right to inherit her mother's *stridhanam* property. On this finding it was held that the daughter's two illegitimate daughters were held to be entitled to their grandmother's *stridhanam* in preference to their mother's brothers. The question whether the illegitimate daughters were entitled to inherit their grandmother's property was never raised. It was merely assumed that the illegitimate daughters took their mother's place. Therefore the judgment in that case cannot be read as deciding the question now before us or accepted as any authority in favour of the appellants' contention.

The learned Advocate for the appellants has drawn the Court's attention to a statement in Sir Hari Singh Gour's Hindu Code, Fourth Edition, page 1149, where it is stated that unchastity and illegitimacy are no bars to succession to *stridhanam*. This broad statement is based on the decisions of the Bombay High Court in *Advyapa* v. *Rudrava*[2] and *Tara* v. *Krishna*[3]. An examination of the judgments in these cases however, fails to lend support to the statement that illegitimacy is no bar to succession to the *stridhanam* if by this is meant succession to the *stridhanam* of a person other than the mother. In the former of these two cases the question was whether under the Hindu Law prevailing in the Bombay Presidency a daughter was barred by incontinence from succession to the estate of her father, and it was held that she was not. In the latter case a daughter who had lived by prostitution claimed her father's property as heir to the exclusion of her sisters who were married. The question was whether the rule that an unmarried daughter inherits to her father before his married daughter applied in such a case.

It is clear that there is no authority which extends the right of an illegitimate daughter to succeed beyond the right to succeed to her mother's *stridhanam*. I consider that the decision of Varadachariar, J., is correct and that the appellants are not entitled to have the alienation set aside. They are not

1. (1902) I.L.R. 26 Mad. 509. 2. (1879) I.L.R. 4 Bom. 104.
3. (1907) I.L.R. 31 Bom. 495.

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Krishnaswami Aiyangar, J.

heirs of Murugayi and the person who is entitled to her property is Venkatachalam who was responsible for the alienation to the respondent's predecessor-in-title. The appeal will be dismissed with costs.

Krishnaswami Aiyangar, J.—I am of the same opinion. I can find no warrant for holding that as a general rule the system of succession under the Mitakshara Law is based on a relationship other than a relationship through valid marriage and legitimate descent. A qualified right in favour of the illegitimate son amongst Sudras, by choice of the father as it has been described, has been recognised but this is in the nature of an exception and must accordingly be kept within the limits of the exception itself. It is true that an illegitimate daughter has been held to be entitled to inherit to the *stridhanam* property of her mother. This right will however be found on examination to be based not upon any ancient texts or rule of law but upon custom and analogy. (See *Myna Bai* v. *Uttaram*[1].) Reference was made by learned Counsel for the appellant to a passage from Yagnavalkya cited in the case mentioned. That passage is:

"A damsel's child is one born of an unmarried woman; he is considered the son of his maternal grand-sire."

This text has reference to the *kanina* son, one of the twelve sons recognised in the ancient law of whom all except one have long since become obsolete. The passage throws no light on the right of a daughter's daughter to inherit to her grandmother's estate. Even if the text should be held to have validity at the present day it would only mean that a *kanina* son would be entitled to inherit directly *as a son* to the maternal grandfather's estate. The text however has really no bearing on the question which falls to be decided in this case.

K.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Ahamed Ibrahim Rowther *v.* Allapichai Rowther.

A. Ahamed Ibrahim Rowther .. *Appellant** (*1st Respondent-Plaintiff*)

v.

Allapichai Rowther and another .. *Respondents* (*Petitioner-1st defendant and Nil*).

Civil Procedure Code (V of 1908), O. 21, rr. 2, 18 and 53 (3)—Satisfaction of decree—Provisional discharge of decree, whether can be basis for

1. (1864) 2 M H.C.R. 196 at 201.

* A. A. A. O No. 136 of 1937 and C. R. P. No. 828 of 1937. 20th September, 1939.

recording satisfaction—Satisfaction of some other decree pending before another Court, whether could be recorded—'Representative' in r. 53 (3)—Meaning of.

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It is undeniable that an executing Court has no power to record satisfaction of a decree over which it has no jurisdiction and a report to the executing Court of satisfaction of some decree pending before another Court will be of no effect. It follows, therefore, if a person represents to a Court that his own decree pending before another Court has been satisfied, though in fact no satisfaction has yet been recorded, he will be doing no more than representing to the Court that he has promised the judgment-debtor that he would record satisfaction of the decree under which the attachment was made. An executing Court has no power under the Code to make a provisional record of satisfaction of a decree. Either a decree is satisfied or it is not, and there is no power for an executing Court to record satisfaction on the basis of a mere promise which is not treated as sufficient discharge. If the Court records satisfaction which is only really provisional on the doing of some future act, such an order cannot be upheld.

It is also doubtful whether under O. 21, r. 2, the Court can recognise an adjustment which is executory in its nature as if it were complete.

Azizur Rahman v *Aliraja,* A.I.R. 1928 Cal 527: 32 C.W.N. 434 and *Lachman Das* v. *Baba Ramnath Kalikamliwala,* (1921) I.L.R. 44 All 258, indicate that the only adjustment contemplated under O. 21, r. 2 is one which has already been completed, not one which rests on future performances. The Code contemplates only an unconditional record of satisfaction.

The mere use of the word 'representative' in r. 53 (3) of O. 21 cannot be taken as justifying the conclusion that the attaching decree holder is the representative of the holder of the attached decree for all purposes. There may be several attaching decree-holders all of whom are undoubtedly entitled to execute the attached decree as representatives of the holder of the decree under attachment To maintain that each of them was for all purposes the representative of the holder of that decree would lead to chaos. The only safe way of interpreting O 21, r. 53 (3) is that adopted by the Calcutta High Court in *Durga Prosad* v. *Secretary of State,* A.I.R. 1937 Cal. 468, that is, to treat the decree-holder of the attaching decree as the representative of the holder of the attached decree only for the purpose contemplated by that sub-rule, namely, the purposes of execution. If this view is correct, it follows that the attaching decree-holder cannot exercise the power conferred under O. 21, r. 2 upon the decree-holder himself of certifying an adjustment made out of Court as a satisfaction of the decree.

Appeal against the order of the Court of the Subordinate Judge of Tuticor in dated 21st January, 1937 and made in A. S. Nos. 111 and 121 of 1935 preferred against the order of the Court of the District Munsif of Tuticorin dated 24th September, 1935, in E. A. No. 58? of 1934 in O. S. No. 11 of 1931, etc.

S. Ramachandra Aiyar and *P. S. Ramachandran* for Appellant.

K. M. T. Ahmed Ibrahim for Respondents.

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The Court delivered the following

JUDGMENT.—The question to be decided in both the revision petition and the appeal is whether the recording of satisfaction of the decree in O. S. No. 11 of 1931 on the file of the District Munsif of Tuticorin at the instance of an attaching decree-holder is valid and consequently whether the refusal to record satisfaction of the decree in O. S. No. 95 of 1932 on the file of the District Munsif of Kumbakonam under which the attachment of the Tuticorin decree was made is invalid, so that the latter decree becomes amenable to attachment at the instance of a third decree-holder. The facts are rather complicated and I will endeavour to state them in their simplest form. We are concerned with three decrees:

(1) O. S. No. 11 of 1931 on the file of the Tuticorin District Munsif which was a decree in favour of Ahmad Ibrahim, the judgment-debtor being Alla Pichai;

(2) O. S. No. 13 of 1932 on the file of the Subordinate Judge, Tuticorin, a decree assigned to K. Mohideen, the judgment-debtor the same Alla Pichai;

(3) O. S. No. 95 of 1932 on the file of the District Munsif of Kumbakonam, a decree assigned to the same Alla Pichai, the judgment-debtor being Ahmed Ibrahim who is the decree-holder under No. 1 decree.

Decree No. 3 was transferred for execution to the Court of the District Munsif of Srivaikuntam where the parties lived. The assignee of this decree Alla Pichai got an order of attachment in Srivaikuntam Court of No. 1 decree against himself the attachment being effected in February, 1934. On 20th March, 1934, Alla Pichai as attaching decree-holder without transferring his own decree to Tuticorin or taking out execution of the decree which he had attached applied to the District Munsif of Tuticorin under S. 151 of the Civil Procedure Code to record satisfaction of decree No. 1 against himself by setting off against this decree, No. 3 decree of which he had obtained an assignment. It will be noticed that in form this was an application to set off two decrees which were not before the same Court, the applicant calling in aid S. 151, Civil Procedure Code, because the procedure under O. 21, r. 18 was not available to him, he not having got his own decree transferred to the Court which was executing the attached decree against himself. Before orders were passed upon this application to record satisfaction, Mohideen the assignee of decree No. 2 passed by the Subordinate Judge of Tuticorin against Alla Pichai attached decree No. 3 which was then on the file of the District

Munsif of Srivaikuntam. On 24th September, 1935, the District Munsif of Tuticorin passed an order on the application to record satisfaction by setting off the decree assigned to Alla Pichai against the decree under which he was the judgment-debtor. In his order the learned District Munsif observes that Alla Pichai certified satisfaction of his own decree—which of course could not be done except in the Court which had jurisdiction over that decree. He also observes that the application does not come under O. 21, r. 18, but he considers that under O. 21, r. 53 an attaching decree-holder has power to report satisfaction of the attached decree and he therefore passes an order which in my opinion is open to serious criticism. He records satisfaction of the attached decree to the extent covered by the amount of the attaching decree, but adds a proviso that the applicant shall within six weeks report to the proper Court full satisfaction of the attaching decree and if he fails to make such a report the order recording satisfaction will stand vacated. That is to say, in effect the learned District Munsif of Tuticorin passed a conditional order recording satisfaction. In pursuance of this order Alla Pichai on 2nd October, 1935, filed a satisfaction memorandum before the District Munsif of Srivaikuntam in respect of the decree of which he had taken an assignment which decree was already under attachment by Mohideen the holder of decree No. 2—Mohideen opposed the application to record satisfaction. The learned District Munsif of Srivaikuntam held that Alla Pichai was not entitled under O. 21, r. 53 to act as the representative of the holder of the decree which he had attached except for the purpose of execution, that the recording of satisfaction by means of what was in fact an adjustment of that decree was invalid and that satisfaction of Alla Pichai's own decree could not be recorded because of the pending attachment and because there was no valid satisfaction of the Tuticorin District Munsif's Court decree. Against the order pas ed by the District Munsif of Tuticorin two appeals were filed, one by Mohideen and the other by Ahmed Ibrahim and against the order passed by the District Munsif of Srivaikuntam an appeal was filed by Alla Pichai. All three were heard together by the Subordinate Judge who held that the order of the District Munsif of Tuticorin recording satisfaction of Ahmed Ibrahim's decree by reason by the adjustment of the amount due under Alla Pichai's decree was valid.

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I have now before me a Civil Revision Petition filed by Mohideen and an appeal by Ahmed Ibrahim both canvassing the correctness of the same appellate order. I do not think it necessary to discuss at length the question whether the proper remedy is one by appeal or one by revision. It seems to me that so far as Ahmed Ibrahim is concerned the question is one clearly between the parties relating to the satisfaction of his decree and an appeal would lie. So far as Mohideen is concerned the contest is between an attaching decree-holder and the holder of the decree attached. *Prima facie* it is not one between parties arrayed on opposite sides in the suit and the proper remedy is revision.

The main question is whether the order of the District Munsif of Tuticorin in effect setting off one decree against the other is a valid order. It is common ground that this order cannot be justified as one falling within the provisions of O. 21, r. 18. Nor does it purport to have been passed that rule. It is contended that the Code does not contemplate any procedure for setting off one decree against another unless both the decrees are within the jurisdiction of the same Court so that they fall within O. 21, r. 18. (Vide *Ponnusami Nadar* v. *Doraisami Aiyar*[1].) No doubt this is a correct proposition in the sense that there is no express provision in the Code authorising the Court itself to set off one decree against another unless both the decrees are before the Court. There is however provision in the Code for recording satisfaction by way of adjustment out of Court and an adjustment out of Court may be by means of the setting off of one decree against another if there is no legal objection to this course. Provided that Alla Pichai was legally entitled to adjust the decree which he had attached by setting off against it the decree assigned to him, the fact that this adjustment does not come within the provisions of O. 21, r. 18 would not of itself bar the recording of satisfaction.

Now it is undeniable that an executing Court has no power to record satisfaction of a decree over which it has no jurisdiction and a report to the executing Court of satisfaction of some decree pending before another Court will be of no effect. It follows therefore that when Alla Pichai represented to the

1. (1909) I.L.R. 32 Mad. 336.

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District Munsif of Tuticorin that his own decree pending before the District Munsif of Srivaikuntam had been satisfied, though in fact no satisfaction had yet been recorded, he was doing no more than representing to the Court that he had promised the judgment-debtor (who incidentally was himself) that he would record satisfaction of the decree under which the attachment was made. Looked at in this way it seems to me apparent that Alla Pichai was asking the District Munsif of Tuticorin to record not an actual satisfaction of the decree of that Court, but a prospective satisfaction of the decree. Having regard to the powers of the Tuticorin Court, all that Alla Pichai could do was to represent that he was willing to record satisfaction of his own decree if the District Munsif of Tuticorin would accept that as a sufficient discharge of the decree against himself. The District Munsif of Tuticorin treated as done that which the applicant promised to do; but, realising the danger of this course and perhaps being doubtful of the powers which he proposed to exercise, he inserted in his order a sort of escape clause whereby, if the applicant failed to do that which he had promised, the District Munsif was to cancel the order which he had passed on the strength of that promise. Now it seems to me that an executing Court has no power under the Code to make a provisional record of satisfaction of a decree. Either a decree is satisfied or it is not and there is no power of which I am aware, for an executing Court to record satisfaction on the basis of a mere promise which is not treated as a sufficient discharge. It may perhaps be permissible for a decree-holder to accept a promise as a discharge and to record satisfaction on that basis; and conceivably the Court might if it saw fit, grant the application on the strength of this acceptance. But this is not what the learned District Munsif has done. He has in fact recorded in the form of satisfaction that which is really only a provisional satisfaction conditional on the doing of some future act. To my mind he had no power to do this.

It is also very doubtful whether under O. 21, r. 2, the Court can recognise an adjustment which is executory in its nature as if it were complete. The decisions in *Azizur Rahman* v. *Aliraja*[1], *Lachman Das* v. *Baba Ramnath Kalikamliwala*[2] and *N.P.L. Firm* v. *B. K. Bhanja*[3] indicate that the only adjust-

1. A.I.R. 1928 Cal. 527: 32 C.W.N. 434.
2. (1921) I.L.R. 44 All. 258.
3. A.I.R. 1934 Rang. 190 (1).

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ment contemplated under O. 21, r. 2 is one which has already been completed not one which rests on future performances. But quite apart from this question it seems to me apparent that in recording satisfaction the executing Court cannot undertake the responsibility of seeing to the future performance of provisions in the agreement upon which the satisfaction is based. The Code contemplates only an unconditional record of satisfaction.

A wider question is whether in any case an attaching decree-holder is entitled by the terms of O. 21, r. 53 (3) to make an adjustment of the attached decree and record satisfaction by reason of that adjustment. On this subject there is difference of judicial opinion and, so far as I am aware, no decision of this High Court. In *Durga Prosad Chamaria* v. *Secretary of State*[1], it was held that under r. 53 (3) the attaching decree-holder is the representative of the holder of the attached decree for the limited purpose of execution and not for all purposes and is therefore incapable of making a valid adjustment of the attached decree. A similar decision was passed by a single Judge in the case reported in *Ram Badan Singh* v. *Ram Pargash Singh*[2], which has, however, been dissented from by a Bench of the same Court in *Unao Commercial Bank, Ltd., Unao* v. *Mohar Gobind Rai*[3]. There is an observation in the decision in *Ramcharan Singh* v. *Janghahadur Singh*[4], to the effect that there is nothing in r. 53 to prevent an adjustment by payment out of Court between the judgment-debtor of the attached decree and the decree-holder of the attaching decree. The question is not easy and in view of my decision on the earlier points is no longer of vital importance for the present case. But as it has been argued at length it seems to me desirable that I should indicate my opinion.

R. 53 (3) says:

"The holder of a decree sought to be executed by the attachment of another decree . . . . . shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof."

The argument is that by virtue of S. 146 of the Code of Civil Procedure, if there is no prohibition imposed by law, any proceeding which may be taken by the holder of the attached

1. A.I.R. 1937 Cal. 468.
2. A.I.R. 1925 All. 123 (2).
3. A.I.R. 1930 All. 659.
4. A.I.R. 1924 Pat. 696.

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decree may be taken by the holder of the decree under which the attachment is made, since the latter is the representative of the former. In my opinion, the mere use of the word representative in r. 53 (3) cannot be taken as justifying the conclusion that the attaching decree-holder is the representative of the holder of the attached decree for all purposes. It is unnecessary to dwell at length on the complications which would arise unless the converse were true, but I would point out that there may be several attaching decree-holders all of whom are undoubtedly entitled to execute the attached decree as representatives of the holder of the decree under attachment. To maintain that each of them was for all purposes the representative of the holder of that decree would lead to chaos. It is pointed out that *A* may have a decree for Rs. 100 against *B* and may attach in execution of his decree a decree against *X* in favour of *B* for Rs. 1,00,000. In such circumstances the extent to which *A* can be the representative of *B* must obviously be governed by the extent of *A's* decree against *B* and to assume that *A* has an unlimited power of representing *B* including a power to compromise the decree which *B* has got against *X* is to put into the hands of *A* a power very liable to abuse. It seems to me that the only safe way of interpreting r. 53(3) is that adopted by the Calcutta High Court in *Durga Prosad Chamaria* v. *Secretary of State*[1], that is, to treat the holder of the attaching decree as the representative of the holder of the attached decree only for the purpose contemplated by that sub-rule, namely, the purpose of execution. If this view is correct, it follows that the attaching decree-holder cannot exercise the power conferred under O. 21, r. 2 upon the decree-holder himself of certifying an adjustment made out of Court as a satisfaction of the decree. On this ground also, therefore, I am constrained to conclude that the order of the District Munsif of Tuticorin recording satisfaction of the decree against All a Pichai was erroneous. It follows that the decree against Alla Pichai must be regarded as still alive and the decree of which Alla Pichai has obtained an assignment and under which he made the attachment must be regarded as still unsatisfied and liable to be executed by Mohideen by virtue of the attachment which he has obtained under his decree against the same Alla Pichai.

1. A.I.R. 1937 Cal. 468.

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In the result, therefore, both the appeal and the Civil Revision Petition are allowed, the order of the District Munsif of Tuticorin recording satisfaction of the decree in O.S. No. 11 of 1931 is set aside and the order of the District Munsif of Srivaikuntam refusing to record satisfaction of the decree in O. S. No. 95 of 1932 on the file of the District Munsif of Kumbakonam is restored. The respondent Alla Pichai will pay the costs of both the appeal and the Civil Revision Petition one Advocate's fee).

Leave to appeal refused.

K. C. —— *Appeal and Civil Revision Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Subbu Pandaram .. *Petitioner* (3rd Defendant)*

v.

Lakshminarayana Chettiar .. *Respondent (Plaintiff).*

Subbu Pandaram v. Lakshmi-narayana Chettiar.

Madras Agriculturists' Relief Act (IV of 1938)—Mortgage decree debt due by Hindu joint family—Application for scaling down by one member—Relief under Act if restricted to his share—Relief if restricted only to agricultural land included in mortgage.

Where one member of a joint Hindu family sought to have a debt due by the joint family scaled down,

Held, any member of a joint family can apply to have the decree debt of the family scaled down and it is the debt of the family as a whole that is to be scaled down, if the family is proved to be an agriculturist within the meaning of Act IV of 1938. The benefit under the Act is not to be restricted to the member of the family who makes the application. The entire scheme of the Act has reference to the character of the debtor and not to the character of the property comprised in a security for the debt. So where there is a mortgage comprising of agricultural land and other properties, the scaling down cannot be restricted only to agricultural land comprised in the mortgage.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Coimbatore dated 12th October, 1938 and made in I. A. No. 899 of 1938 in O. S. No. 79 of 1936.

A. C. Sampath Aiyangar and *S. Krishnamachariar* for Petitioner.

T. S. Anantaraman for Respondent.

The Court delivered the following

JUDGMENT.—The learned Counsel for the petitioner contends that the order of the Court below directing that the debt should

* C. R. P. No. 1636 of 1938. 19th January, 1940.

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be scaled down only so far as the appellant was concerned and also with reference only to the item of agricultural land included in the mortgage, is wrong. I agree with this contention. The decree debt sought to be scaled down is a debt due by the joint family of the third defendant, petitioner herein, and S. 19 of the Act makes it clear that in respect of a joint family debt any member of the family can apply to have the decree debt scaled down according to the provisions of the Act. And it is equally clear that in such cases it is the debt of the family as a whole that is to be scaled down provided, of course, the joint family is proved to be an agriculturist within the meaning of the Act. There is nothing in the Act to suggest that the benefit of scaling down in such cases is to be restricted to the member of the family who makes the application. Again, the view of the learned Subordinate Judge, that the scaling down of a mortgage-debt due by an agriculturist joint Hindu family ought to be only with reference to the agricultural lands which happen to be included in the mortgage but not with reference to other properties like houses, etc., comprised in the mortgage, is erroneous, as the entire scheme of the Act has reference to the character of the debtor and not to the character of the property comprised in a security for the debt.

The learned Counsel for the respondent however points out that the main question raised by him in his counter-affidavit filed in the lower Court, namely, that the petitioner's family was not an agriculturist at all for the reasons stated therein, was not at all dealt with and decided by the learned Judge. This is no doubt so and it is perhaps due to the misconception of the learned Judge that the scaling down under the Act was to be with reference only to the agricultural lands comprised in the mortgage. There is nothing to support the suggestion of the learned Counsel for the petitioner that this point was apparently given up by the respondent whose counsel however repudiates the suggestion before me. In these circumstances I set aside the order of the Court below and send the case back for disposal according to law in the light of the observations herein.

The costs of this petition will abide and follow the result.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Mudala Sithanna and others .. *Appellants* (Defendants 2, 3, 7 and 1)*

v.

Kuppili Lakshminarasimhulu .. *Respondent (Plaintiff).*

Sithanna *v.* Lakshmi-narasimhulu

Evidence Act (I of 1872), S. 13—Prior proceedings on the question of existence of right to office or property—Relevancy as transaction by which right was recognised—Practice—Official records—Late production—Propriety of rejection—Karnam—Office of—If hereditary or family right—Ownership of inam land attached to the office and enfranchised in his or her favour—Nature of.

The karnam occupies his office not by hereditary or family right but as a personal appointee and where lands have been enfranchised to the holders of the office, his representatives and assigns, the lands are his absolute and separate property and his alienee gets a good title.

Venkata Jagannadha v. *Veerabhadrayya,* (1921) 41 M.L.J. 1: L.R. 48 I.A. 244: I.L.R. 44 Mad. 643 (P.C.), relied on.

Palaniyandi v. *Velayudam Pillai,* (1928) 55 M L.J. 579: I.L R. 52 Mad. 6 and *Abdukuri Venkataramadoss* v. *Pachigolla Gavarraju,* (1922) 43 M.L.J. 153, referred to.

A reversioner of a deceased holder of an office of karnam claimed certain properties from alienees and the defence was that the properties were enfranchised mirasi service inam lands and the alienations were valid as the holder was entitled to deal with them as absolute owner as they had been enfranchised in favour of the holder of the office of the karnam. One of the defendants, an alienee, was in possession of certain documents even at the earliest stage relating to prior litigation between the alienor and another (who was claiming to be entitled to the mirasi inam lands and the office jointly with the alienor)—in which it was decided that the alienor was absolutely entitled to the lands. These documents were produced for the first time only at the time of the hearing of the suit.

Held, that the previous proceedings on the question of the existence of the right to the office and property are very relevant as being transactions by which the right was recognised. When documents are official records of undoubted authority which may assist the Court to decide rightly the issue before it, leave should not ordinarily be refused even though they are produced late.

Gopika Raman Roy v. *Atal Singh,* (1929) 56 M L.J. 562: L.R. 56 I.A. 119: I.L.R. 56 Cal. 1003 at 1011 (P.C.), referred to.

Appeals by defendants 2, 3 and 7, and first defendant respectively against the decree of the Court of the Subordinate Judge of Chicacole dated 6th October, 1937, in O. S. No. 37 of 1936.

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* A. S. Nos. 10 and 205 of 1937 and C.M.Ps. Nos. 944 and 2595 of 1937. — 30th August, 1939.

P. Somasundaram and *S. Ramamurthi* for Appellant in Appeal No. 10 of 1937.

V. Govindarajachari for Appellant in Appeal No. 205 of 1937.

J. Krishnamurthi for Respondent in both the appeals.

The Court delivered the following

Mockett, J.

JUDGMENTS. *Mockett, J.*—The relationship between the plaintiff and one Appalanarasamma who is the all-important character in this story is shown in the geneological table herewith annexed.* It will be seen that one Radhakrishnamma married one Venkamma and that they had a daughter Appalanarasamma who died on the 9th February, 1932. The plaintiff is the son of a sister of Radhakrishnamma, namely, Kuppili Peda Raghavamma and he claims the property, the subject of this suit, as a reversioner to the estate of Radhakrishnamma. There are before us four defendants-appellants. In A. S. No. 10 of 1937 defendants 2, 3 and 7 are the appellants and are represented by Mr. P. Somasundaram. The first defendant appeals separately in A. S. No. 205 of 1937 and is represented by Mr. Govindarajachari. The property concerned is as follows: The defendants claim that they are entitled to the suit property; defendant 2 as alienee of portions of item 1 in the plaint which he purchased from the first defendant and Appalanarasamma; the third defendant as alienee also of other portions of item 1 from the same source. The seventh defendant claims under a sale by Appalanarasamma to the sixth defendant and from the sixth defendant to him of item 4 of Schedule A. The appeal concerns only the items to which I have alluded. The answer to this claim was twofold (1) that the lands in sub-items 1 to 4 of item 1 which had been covered by a permanent lease given by Appalanarasamma to the first defendant were enfranchised mirasi service inam lands and (2) that

*Appanna Subedar

Sister Kuppili Peda Raghavamma	Sister Arabhi China Raghavamma.	Died before 1881. Radhakrishnamma. Venkamma died (widow)

Children of Kuppili Peda Raghavamma:

Varahanarasimhulu (died in 1913) married Appalanarasamma.	Lakshminarasimhulu (Plaintiff).	Daughter Appalanarasamma (died on 9-2-1932) married to Varahanarasimhulu,

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Appalanarasamma was entitled to deal with them as absolute owner as they had been enfranchised in her favour while she was the holder of the office of karnam in the village of Lakshmipuram. The legal position relating to the ownership of inam lands attached to the office of karnam and enfranchised in his or her favour has been well settled, by the Judicial Committee and in this High Court. It was decided by the Judicial Committee in *Venkata Jagannadha* v. *Veerabhadrayya*[1] that the karnam of a village in Madras occupies his office not by hereditary or family right but as a personal appointee, although the appointment is primarily made of a suitable person who is a member of a particular family and that where karnam service lands have been enfranchised, a quit rent being imposed in lieu of the service, and an inam title deed is granted confirming the lands to the holder of the office, his representatives and assigns, the lands are his separate property and are not subject to any claim to partition by other members of the family. The result of that is that when lands of this description are alienated by a karnam, the alienee gets a good title. That principle has been applied to the case of women representatives who occupy the position of karnam in *Palaniyandi* v. *Velayudam Pillai*[2] and *Abdukuri Venkataramadoss* v. *Pachigolla Gavarraju*[3]. It is unnecessary to go into this position at any length because there is no contention about the legal position and there is very little contention now about the one point which we for some time had discussed before us. It was naturally of the utmost importance to the defendants in this case, resting as they did their title on the position of Appalanarasamma as the karnam of this village, to establish that she was actually in that position and that the enfranchisement was in her favour. There were in the possession of the defendants at the earliest stage of this case certain documents which went a long way towards establishing this position. Those documents arose under the following circumstances. There had been litigation long ago between Appalanarasamma and one Koduru Venkanna in O. S. No. 388 of 1909 in the District Munsif's Court of Parvathipur. It appeared that Koduru Venkanna was claiming that he was entitled to the mirasi inam lands of

1. (1921) 41 M.L.J. 1: L.R. 48 I.A. 244: I.L.R. 44 Mad. 643 (P.C.).
2. (1928) 55 M.L.J. 579: I.L.R. 52 Mad. 6.
3. (1922) 43 M.L.J. 153.

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Lakshmipuram village jointly with Appalanarasamma. Appalanarasamma's contention which it was necessary for her to vindicate by a suit was that Venkanna was no more than her agent or representative to carry out the duties of karnam, she being a woman, but that she was the sole karnam and had the sole right to these lands. So it will be seen that the most important question to be considered in that case was what was the legal position of Appalanarasamma in relation to the karnamship. The matter was heard by the District Munsif and his judgment which is now marked as Ex. 15 was produced to the learned Judge. It is a long judgment and there was a decree finally which is marked as Ex. 14. It awarded Appalanarasamma the wet lands claimed but refused a decree for the dry lands. Against that decree there was an appeal to the District Judge whose judgment is marked as Ex. 17. It concluded in paragraph 12 with the following words:

"I am therefore of opinion that plaintiff is entitled to have all the suit lands exclusively enfranchised in her name and the entry of defendant's name in the title deed as a joint owner is fraudulent and illegal."

So Appalanarasamma succeeded in her claim to the dry lands also. The District Judge had before that held in paragraph 8 that the plaintiff was the holder of the office at the time of the enfranchisement and not defendant but that defendant was only a deputy doing duties of the office on behalf of plaintiff. The matter in second appeal in this High Court was peremptorily rejected and in the result the learned District Judge's judgment was affirmed. Therefore the position of Appalanarasamma had been a matter of the fullest investigation before a Court of law and it seems to me that under S. 13 of the Evidence Act these proceedings on the question of the existence of her right in this office and property would have been and are very relevant as being transactions by which the right was recognised. Most unfortunately, in the lower Court copies of these documents according to the learned Judge were not produced until the hearing of the suit. He rejected them because, as is obvious, their receipt in evidence was opposed by the plaintiff. The learned Judge said:

"These documents are for the first time produced into Court only to-day and the explanation for their non-production previously is not satisfactory. They were not also mentioned in any list filed with the written statement as documents on which defendants wanted to rely."

There does not appear to us to be any provision of the Code which provides for this list to which the learned Judge refers

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but that apparently was one of the grounds on which he excluded these documents. Except for two documents Nos. 8 and 12, which were a registered notice and a public copy of a lease, the whole of these documents were rejected including all these records of the proceedings in the District Munsiff's Court of Parvatipur. The Judicial Committee, if authority is needed, have emphasised that when documents are official records of undoubted authenticity which may assist the Court to decide rightly the issues before it, leave should not ordinarily be refused even though they are produced late. (*Gopika Raman Roy* v. *Atal Singh*[1].) I can imagine no stronger case for granting leave than this. These documents had been referred to in the pleadings. They are documents about whose authenticity there cannot be the slightest question, being Court records. They were produced before the case started on the first day and yet they were summarily rejected by the learned Judge for reasons which I confess I do not understand. A petition has been presented to us asking that these documents should be admitted in evidence and after hearing both sides we have decided that this petition should be allowed. Certified copies of these documents are now before us though before the learned Judge—copies contained in the printed papers in the old litigation had been produced and the result seems to prove conclusively the case which the defendants seek to establish, namely, that Appalanarasamma was entitled to deal with these properties by virtue of holding this office and of the enfranchisement of the properties. Now it is very unfortunate that there was not produced to the learned trial Judge a copy of the Inam Register which might have put this matter beyond any further dispute. We therefore thought it right to suggest to Mr. Lakshmanna for the respondent, if he so desired, that time would be given to him to obtain certified copies of the relevant entries from the Board of Revenue as an answer to these documents which we now admit; but Mr. Lakshmanna did not think it worthwhile. In fact although every thing possible was said, finally I think he was driven to the position that it was quite impossible to maintain (1) that these documents should not be admitted and (2) when they were admitted that the defendants' case was not established and the plaintiff's case thereby defeated. This however concerns item 1, sub-items 1

1. (1929) 56 M.L.J. 562: L.R. 56 I.A. 119: I.L.R. 56 Cal. 1003 at 1011 (P.C.).

to 4 only. Items 2 (*a*) and 2 (*b*) which are among the sub-items concern the second and third defendants. All those items are covered by the admission of these documents (together with items 1 to 4 in the plaint schedule). Item 4 of the plaint schedule however is said to rest upon a will of Radhakrishnamma which was not produced in the lower Court but which was sought to be proved by the production of a document, Ex. I said to be signed by Radhakrishnamma in which the execution of a will in favour of Venkamma was admitted. That document which seems to contain all possible admissions necessary for this part of the defendants' case rested also on the evidence of three witnesses. D. W. 1 produced the document. He says that Koduri Venkanna was his mother's father and he found Ex. I in his father's records. Why this Koduri Venkanna should be in possession of this document is not clear. So Ex. I started its career by being produced not from proper custody but from unexpected custody. D. W. 2 identified the signature in Ex. I of Pattabhiramayya. D.W. 3 an old gentleman of 80 identified the signature of Radhakrishnamma the maker of the document. The learned Judge regarded this document as suspect and was not satisfied with the evidence of these witnesses and we are inclined to take the same view. It certainly cannot be said that the learned Judge was not entitled to arrive at the conclusion which he did and we are proposing to confirm that part of his judgment. So far as any claim therefore is made under this will referred to in Ex. I it must fail. The claim to item 4 and sub-item 5 of item 1 has not therefore been established by the defendants or any of them. But so far as the rest of the properties are concerned I am satisfied that the defendants by the production of Exs. 14, 15, 17 and 19 which we have now admitted and which should have been admitted in the Court below have established beyond doubt that Appalanarasamma occupied this position and that the power to alienate these properties was hers. As the defendants claim title from her their title is therefore good.

Mr. Somasundaram took exception to the learned Judge's order with regard to mesne profits. But the only evidence before the learned Judge was the evidence of P.W. 2 who gave the total of the mesne profits from all these lands as Rs. 800. The defendants did not think fit to give the Court any assistance. The learned Judge was therefore in a difficulty but he arrived—

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how exactly it is not clear—at the view that the proper amount should be taken to be Rs. 752 and he consequently estimated that the mesne profits should be decreed at that amount which equals Rs. 16-7-0 per acre. It does not seem to me to lie in the mouth of Mr. Somasundaram to complain about this figure Rs. 752; the answer might well have been that the sole evidence on the record was of a larger figure, Rs. 800 and that that amount might well have been awarded.

In the result therefore in substance, except as I have indicated, this appeal must succeed. With regard to costs the parties will pay and receive proportionate costs here and below to the extent of their respective success. The court-fee also will be shared in the same proportion.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I entirely agree. As observed by my learned brother there are two defences put forward (1) a defence that would cover all the items claimed by the plaintiff in the suit, namely, that the last male holder Radhakrishnamma left a will by which he bequeathed his entire estate to his widow Venkamma for life and after her life absolutely to his daughter Appalanarasamma. If this will were true it would afford a defence to the entire suit. The learned Judge has found against it and the matter has been discussed in the judgment of my learned brother. I agree that there is no sufficient material for disturbing the finding of the learned Judge.

The second defence related only to the inam land of the extent of 22 acres consisting of 12 acres wet and 10 acres dry. It had been originally attached to the office of karnam held in the family. Radhakrishnamma held the office and after his death it is clear that Appalanarasamma held it. Sometime prior to 1909 while Appalanarasamma was the holder of the office and was in enjoyment of these inam properties they were enfranchised and an inam title deed came to be issued not in the name of Appalanarasamma alone as it should have been, but in the joint names of Appalanarasamma and Koduri Venkanna. Koduri Venkanna was the husband of the mother's sister of Appalanarasamma and appears to have been a gumastah for doing the karnam service both during the lifetime of Radhakrishnamma and after his death when Appalanarasamma was the holder of the office. He apparently took advantage of his position and the ignorance of Appalanarasamma and managed

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Krishna-swami Aiyangar, J.

to get the inam title deed issued jointly in the names of himself and Appalanarasamma behind her back. This led to the litigation started by O. S. No. 388 of 1909 on the file of the District Munsif's Court of Parvatipur. The District Munsif upheld the claim of Appalanarasamma in regard to the wet lands alone, dismissing her suit in regard to the dry lands on the ground that she was not shown to have been in possession of them. The District Judge in A. S. No. 550 of 1910 declared her right to both the wet and dry lands comprised in the inam and also directed that the inam title deed should be amended accordingly. This judgment was confirmed by the High Court in S. A. No. 1020 of 1912. The result of this litigation was that Appalanarasamma's absolute title to the entire property to the exclusion of Koduru Venkanna based upon the enfranchisement of the inam land in the names of both was established. That being so her alienations of these enfranchised inam lands cannot be questioned by the reversioner as it is settled that an enfranchisement confers absolute title on the enfranchisee.

It is necessary to mention that the inam lands comprise sub-items 1 to 4 only in item No. 1 of the schedule to the plaint, two of these sub-items being 2 (*a*) and 2 (*b*) separately numbered for purposes of identification. Appellant No. 1 in A. S. No. 10 of 1937 succeeds in regard to item 2 (*a*) and appellant No. 2 succeeds in regard to item 2 (*b*). So far as appellant No. 3 [who was the seventh defendant in the Court below and who put forward a claim to item (4)] is concerned, he fails as his only ground of defence was the will which has been found against by us. So far as he is concerned the appeal must therefore be dismissed. The appellant in A. S. No. 205 of 1937 who was the first defendant in the Court below succeeds in regard to two of the sub-items in item 1, namely, those other than 2 (*a*) and 2 (*b*) and to that extent his appeal succeeds.

In the result, the plaintiff's suit will be dismissed as regards all the four sub-items of item 1 of the plaint schedule inclusive of items 2 (*a*) and 2 (*b*) separately numbered which are the items purchased by the second and third defendants who are appellants 1 and 2 in A. S. No. 10 of 1937.

K. S. *Appeal allowed in the main.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Koka Adinarayana Rao Naidu.. *Petitioner* (1st Respondent)*

v.

Koka Kothandaramayya Naidu and others .. *Respondents (Petitioner and Respondents 2 to 4).*

Adinarayana Rao Naidu *v.* Kothandaramayya Naidu.

Civil Procedure Code (V of 1908), S. 152—Scope—Error in consent decree—Rectification—Power of Court—Amended decree being appealable—Maintainability of revision.

S 152, Civil Procedure Code, does not empower a Court to rectify a decree merely because the decree is wrong or unfair or because the parties have not realised their rights and put them before the Court in such a way as to enable a correct decree to be passed. The powers given under that section only relate to arithmetical mistakes or errors arising from an accidental slip or omission. And the Court has no jurisdiction under S. 152 to add to a term in a consent decree without the consent of both parties to the decree.

Ordinarily the High Court will not entertain a revision petition when a remedy by way of appeal is available. But in very special circumstances if there is a clear error relating to jurisdiction it may at its discretion do so.

Viswanathan Chetty v. *Ramanathan Chetty,* (1901) I.L.R. 24 Mad. 646, considered.

Petition under S. 115 of Act V of 1908 and S. 224 of the Government of India Act praying the High Court to revise the order of the District Court of Ganjam Puri at Berhampore dated 1st April, 1937 and made in C. M. P. No. 437 of 1935 in A. S. No. 191 of 1918.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Petitioner.

P. V. Rajamannar and *K. Subba Rao* for Respondents.

The Court delivered the following

JUDGMENT.—This revision petition is filed against an order passed in April, 1937, amending under S. 152, Civil Procedure Code, a decree of April, 1919. The judgment, from which this decree proceeds, was passed on the consent of the lawyers representing both parties. The Judge who passed the decree and the leading counsel who represented both sides are all said to be dead. The facts are a little complicated but the essential points may be summarised briefly.

The petitioner here was the first defendant in a partition suit and the preliminary decree declared the petitioner and the

* C. R. P. No. 1077 of 1937. 15th September, 1939.

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respondent each to be entitled to half of the family properties. At the final decree stage there were difficulties in working out what were the rights and liabilities of the parties. The trial Court passed its final decree on the report of a commissioner who amongst other things found that the first defendant was liable for four sums making up a total of Rs. 1,888-14-10 in respect of debts due to the family which he had collected. In appeal the learned District Judge passes a judgment the first paragraph of which runs as follows:—

"The parties have agreed about the amount of debts due by the family and about the amount of debts due to the family which were allowed by the first defendant to become time-barred. The amount which plaintiff has to pay under Ex. 49" (that is, debts due by the family) "is Rs. 4,043-10-0 and the amount to be deducted for his share of barred debts is Rs. 1,253-13-5 The net amount which plaintiff has to pay is Rs. 2,789-12-7"

The learned Judge then goes on to deal with the various subsidiary items on which the parties are agreed and then mentions that the questions with regard to these matters had been discussed in Court with the Vakils on both sides and an agreement had been reached and ends by saying that the final decree will be revised accordingly.

When the decree was drafted, it prescribed that the plaintiff should pay "Rs. 2,789-12-7 as agreed by the parties about the amount of debts due by the family and about the amount of the debts due to the family." The decree is silent about the first defendant's liability in respect of debts actually collected.

It is contended that the omission of any reference to the fact that this sum of Rs. 2,789-12-7 is merely the net result of subtracting the liability of the defendants for time-barred debts from the amount of the plaintiff's liability for debts due by the family, has resulted in an omission to give to the plaintiff a decree for these four items making up Rs. 1,888-14-10 which were taken into account in the lower Court's decree and which the appellate Court did not intend in any way to disallow.

Apparently the parties did not realise that there was anything wrong with this decree and the plaintiff in execution claimed this sum of Rs. 1,888-14-10 under the decree as amended. He succeeded in two Courts but in second appeal Mr. Justice Jackson held that though this sum might well be really due to the plaintiff, the parties having allowed an agreed statement to be embodied in the decree that the plaintiff do pay

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so much, they could not afterwards ask the executing Court to recast the amount and amend the decree. This judgment was confirmed in Letters Patent Appeal.

After the plaintiff had failed to get the decree interpreted as covering this claim for Rs. 1,888-14-10 he filed an application before the learned District Judge under S. 152 of the Civil Procedure Code, asking that the decree passed some 18 years previously should be amended by the insertion of words making the first defendant liable for Rs. 1,888-14-10. The learned District Judge has held that clearly this amount was due, that it was omitted from the decree by error and has ordered the amendment of the decree, but has disallowed costs on the ground that the amendments should have been applied for nearly 0 years previously.

It is contended that the remedy, if the order of the learned District Judge is wrong, should be by way of appeal against the amended decree and not by way of revision, the authority being *Viswanathan Chetty* v. *Ramanathan Chetty*[1]. I may point out this objection was not taken, as it should have been, until after this rather troublesome case had been argued on the merits at full length. Indeed it seems to me that assuming the decision in *Viswanathan Chetty* v. *Ramanathan Chetty*[1] to be good law (and I may remark that it seems to run contrary to the general lines of decisions of other High Courts) the petitioner should not be non-suited merely because he has filed a revision petition, but should be permitted to pay the court-fee on the amount decreed against him and his revision petition should be treated as an appeal, it having been filed within time for an appeal. But I doubt very much whether there is any prohibition against the Court entertaining a revision petition in very special circumstances against an order passed without jurisdiction by reason of the fact that an appeal might have been filed against the amended decree resulting therefrom. Granted that the rule in *Viswanathan Chetty* v. *Ramanathan Chetty*[1] may be a sound rule for general guidance, there is the authority for the view that in special circumstances this Court can interfere by way of revision against an order passed without jurisdiction, even when there is a possibility of questioning the correctness of the order by way of a regular appeal. The decision in *Viswanathan*

1. (1901) I.L.R. 24 Mad. 646.

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Chetty v. *Ramanathan Chetty*[1] was considered in somewhat similar circumstances to those before me by the learned Judge who decided *Bhagirathi Nethiar Amma* v. *Minakshi Nethiar Amma*[2], in which revision was allowed against an order to amend the decree on the grounds that the amendment was by the trial Court of an appellate decree and was therefore without jurisdiction. This decision seems to postulate that the rule in *Viswanathan Chetty* v. *Ramanathan Chetty*[1] is not an absolute rule for, surely, it would have been open in this case also to file an appeal against the decree as amended.

The correct view must be that ordinarily this Court will not entertain a revision petition when a remedy by way of appeal is available; but that in very special circumstances if there is a clear error relating to jurisdiction, it may at its discretion do so. In the circumstances of the present case, I do not think it necessary to call upon the petitioner to pay the court-fee requisite to convert this petition into an appeal. The circumstances are to my mind very unusual. The learned District Judge has exercised powers under S. 152, Civil Procedure Code, 18 years after the decree was passed, when the decree itself was one passed on the consent of parties and the persons who were able to speak to the terms of that consent are dead. In my opinion, S. 152 does not empower a Court to rectify a decree merely because that decree is wrong or unfair or because the parties have not realised their rights and put them before the Court in such a way as to enable a correct decree to be passed. The powers given under this section only relate to arithmetical mistakes or errors arising from an accidental slip or omission. It seems to me impossible to hold long after the event that when there is an apparent omission of an important term from a judgment proceeding on the consent of parties, this term has been omitted by an accidental slip. No one knows what took place when the learned District Judge, who is now dead, discussed the rights and liabilities of the parties with the two learned Counsel, who are also dead. It is not impossible that Counsel may have given up one claim in order to secure another claim. To my mind there can be no certainty that the omission of this term from the final decree as amended by the late District Judge was due to any mere error. Assuming that it was due to an error, there is still less certainty that the error was an

1. (1901) I.L.R. 24 Mad. 646, 2. (1916) 31 M.L.J. 438,

Adinarayana Rao Naidu v. Kothandaramayya Naidu.

accident for which the Court itself was responsible and that it was not due to lack of diligence on the part of one of the parties. It is a dangerous thing to add terms to a consent decree and I doubt very much whether the Court has jurisdiction to do so under S. 152, at any rate without the consent of those who agreed to the original order. The presumption is that this judgment and the decree drafted in accordance therewith were scrutinised by the learned gentlemen with whose consent the judgment was passed. "It is," as Jackson, J., observes:

"not right when the parties have allowed an agreed statement to be embodied into a decree that the plaintiff do pay so much, to ask the executing Court to recast the amount and amend the decree"

The objection is to my mind just as forcible when the request is made at a very late stage to the trial Court under S. 152, as when it was made to the executing Court. In this view I must hold that the learned District Judge had no jurisdiction under S. 152 to add a term to what is in fact a consent decree without the consent of both parties. The Civil Revision Petition is therefore allowed with costs here and in the Court below and the amendment to the decree will be expunged.

B. V. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Kopparthi Venkataratnam and another .. *Appellants** (*Appellants*)

v.

Palleti Sivaramudu and another .. *Respondents* (*Respondents*).

Venkataratnam v. Sivaramudu.

Indian Contract Act (IX of 1872), S. 19, Exception—Vendor deliberately making false statement—If vendee put upon inquiry.

A vendor deliberately concealed from a purchaser the fact that he had already granted a lease of the property sold, but the buyer if he had been diligent could have ascertained this as the lease was registered.

Held, the absence of exercise of diligence by the buyer was not a defence open to the vendor who had concealed the fact of the execution of the lease in order to deceive the vendee and had induced him to enter into the contract and the conveyance must be set aside on the ground of fraud.

Harilal Dalsukhram Sahiba v. *Mulchand*, (1928) I.L.R. 52 Bom. 883, disapproved.

Niaz Ahmad Khan v. *Parshotam Chandra*, (1930) I.L.R. 53 All. 374; *John Minas Apcar* v. *Louis Caird Malchus*, I.L.R. (1939) 1 Cal. 389 and *Morgan* v. *The Government of Hyderabad*, (1888) I.L.R. 11 Mad. 419, followed.

Decision of Horwill, J., affirmed.

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* L. P. A. No. 9 of 1938. 21st November, 1939

Venkata-ratnam v. Sivaramudu

Appeal under cl. 15 of the Letters Patent against the decree of the Hon'ble Mr. Justice Horwill dated 12th October, 1937 and passed in Second Appeal No. 886 of 1933 preferred to the High Court against the decree of the District Court of Nellore in A. S. No. 208 of 1931 (O. S. No. 645 of 1929, District Munsif's Court, Nellore).

A. Bhujanga Rao and *D. R. Krishna Rao* for Appellants.

Ch. Raghava Rao and *T. Satyanarayana* for Respondents.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—This Letters Patent Appeal arises out of a suit filed by the respondents' mother in the Court of the District Munsif of Nellore for a decree setting aside a conveyance on the ground of fraud. The respondents' mother was an ignorant cultivator and she bought from the first defendant in the suit, the appellants' father, certain wet lands in the Nellore District. The first defendant had granted a lease of these lands for seven years to a third party. Not only did the first defendant fail to disclose this fact to the vendee, but he represented to her that she could take immediate possession and cultivate the lands. This amounted to a fraudulent misrepresentation and as this is the finding of the District Judge on first appeal it cannot be challenged in this Court. The District Munsif held that there was no fraud, but granted the plaintiff a decree for damages based on the amount of two years' mesne profits. The District Judge reversed this decision and decreed the suit as prayed. There was a second appeal to this Court which was heard by Horwill, J. The learned Judge accepted the decision of the District Judge, but granted a certificate under cl. 15 of the Letters Patent.

The appeal turns upon the interpretation to be placed upon the words in the exception to S. 19 of the Indian Contract Act. S. 19 says that when consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. The exception reads as follows:—

> "If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of S. 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence."

The appellants' case is that inasmuch as the lease which their father had granted to the third party was a registered

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one the fact that he had fraudulently represented to the vendee that she was in a position to take possession of the property at once made no difference, because if she had used ordinary diligence she would have made a search in the registration office, and if she had done so, she would have discovered that there was a registered lease which precluded her from taking possession. It is accepted that where a vendor has deliberately made a false statement with the object of concealing the true position with regard to property the vendee under English Law is not put upon enquiry, but it is said that the exception to S. 19 was intended to place the Indian Law on a different basis.

The meaning to be placed upon the words used in the exception was fully discussed by the Allahabad High Court in *Niaz Ahmad Khan* v. *Parshotam Chandra*[1] and I consider that the position was correctly stated in the following passage in the judgment:—

"The difficulty is caused mainly by the punctuation, namely, a comma after the word 'silence', which seems to indicate that the words 'fraudulent within the meaning of S. 17' apply both to 'misrepresentation' and to 'silence'. But as observed by their Lordships of the Privy Council in the case of *Maharani of Burdwan* v. *Murtunjoy Singh*[2] and *Pugh* v. *Ashutosh Sen*[3], the punctuation is not part of the statute and a Court of law is bound to interpret the section without the comma inserted in the print. If the comma after the word 'silence' is to be ignored, the expression 'fraudulent' within the meaning of S. 17 might well apply to 'silence' exclusively and not to 'misrepresentation'. This interpretation is strengthened by the circumstance that the legislature had used the preposition 'by' twice, *i.e.*, both before 'misrepresentation' and also before 'silence'. If the expression 'fraudulent within the meaning of S. 17' qualifies 'misrepresentation', the result would be that due diligence would be required in the case where misrepresentation became fraudulent, but would not be required when the misrepresentation fell within S. 18 and was just short of fraud, for the Exception would be confined to the former kind only. This would be a startling result."

There is no reason whatsoever for thinking that the Legislature intended to depart from the English Law when it inserted the exception. It would be lamentable if a person who is guilty of deliberate fraud could benefit by his fraud because the victim accepted his statements as being true. The judgment of the Allahabad High Court was also accepted as embodying the correct statement of the law by the Calcutta High Court in *John Minas Apcar* v. *Louis Caird Malchus*[4].

1. (1930) I.L.R. 53 All. 374.
2. (1887) L.R. 14 I.A. 30: I.L.R. 14 Cal. 365 (P.C.).
3. (1928) 56 M.L.J. 517: L.R. 56 I.A. 93: I.L.R. 8 Pat. 516 (P.C.)
4. I.L.R. (1939) 1 Cal. 389.

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This Court considered the effect of S. 19 of the Contract Act in *Morgan* v. *The Government of Hyderabad*[1], a case very similar to the one now before us. A vendee had deliberately concealed from a purchaser the fact that he had already granted a lease of the property sold, but the buyer if he had been diligent could have ascertained this. The Court held that the case was not within the exception to S. 19 and the absence of exercise of diligence by the plaintiff was not a defence open to the defendant who had concealed the fact of the execution of the lease in order to deceive the plaintiff and had induced him to enter into the contract. This is the position here.

The only decision contrary is that of the Bombay High Court in *Harilal Dalsukhram Sahiba* v. *Mulchand*[2]. The Bombay High Court merely based its decision on a reading of the exception and did not consider whether the punctuation was correct or whether the Legislature intended to make what would be a startling departure from accepted principle.

I am of opinion that the appeal should be dismissed with costs.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I concur.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Chidambaram Chettiar .. *Petitioner** (*Petitioner-Defendant*)

v.

Muthukumaraswami Chettiar .. *Respondent* (*Respondent-Plaintiff*).

Chidambaram Chettiar v. Muthukumaraswami Chettiar.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Order under—Revision—Provision of right of appeal against such orders by the new rules—If retrospective—Effect on competency of pending revision petitions.

The petitioner claiming to be an agriculturist applied for the amendment of the decree against him under S. 19 of Act IV of 1938. The District Munsif dismissed the petition on 4th May, 1939. The petitioner then filed the present petition under S. 115 of Civil Procedure Code for revision of the Munsif's order. The respondent raised the objection that the petition for

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1. (1888) I.L.R. 11 Mad. 419.
2. (1928) I.L.R. 52 Bom. 883.

*C. R. P. No. 1129 of 1939. 11th December, 1939.

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revision does not lie because the amended rules under the Act dated 27th October, 1939, provided an appeal against the orders under S. 19.

Held, the amended rules cannot have retrospective effect and do not govern the present case.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Cuddalore dated 4th May, 1939, in I.A. No. 1478 of 1938 in O. S. No. 363 of 1936.

A. C. Sampath Aiyangar for Petitioner.

T. E. Ramabhadrachari for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The petitioner claims to be an agriculturist within the meaning of the Madras Agriculturists' Relief Act, 1938. On the 8th October, 1938, he filed an application in the Court of the District Munsif of Cuddalore asking for the amendment under S. 19 of the Act of a money decree which had been passed against him. By an order dated the 4th May, 1939, the District Munsif dismissed the application. The petitioner then filed the application now before us asking this Court to reverse the District Munsif's decision under the powers of revision conferred by S. 115 of the Code of Civil Procedure. The respondent says that the petition does not lie because the Government has amended the rules framed under the Act and by the amendment has provided for an appeal against an order passed under S. 19. The petitioner contends that the new rules cannot have retrospective effect. This question calls for decision before the Court examines the reasons advanced by the petitioner for the order which he seeks.

The amendment of the rules framed under the Act was made by an order of the Government dated the 27th October, 1939. The amendment is said to have been made in exercise of the powers conferred by sub-S. (1) and cl. (*c*) of sub-S. (2) of S. 28 of the Act. By the order r. 8 was added to the rules and this rule *inter alia* provides that an appeal shall lie from an order under S. 19 amending or refusing to amend a decree or entering or refusing to enter satisfaction in respect of a decree, as if the order related to the execution, discharge or satisfaction of the decree within the meaning of S. 47 of the Code of Civil Procedure, 1908. Sub-S. (1) of S. 28 of the Act states that the Provincial Government may make rules for carrying into effect the purposes of the Act.

Sub-S. (2) (*c*) says that in particular and without prejudice to the generality of the power conferred by sub-S. (1), the Provincial Government may make rules for removing any difficulty in giving effect to the provisions of the Act. The Court is not called upon in this case to decide whether under S. 28 the Government has power to make provision for appeals by amendment of the rules, because it is quite clear that the amended rules cannot have retrospective effect, and therefore they do not govern the present case. There is nothing in the Act or in the rules which supports the respondent's contention that retrospective effect should be given to the amended rules. The amendments to the rules are not of a declaratory nature. R. 8 makes an entirely new provision. This being the case it cannot have retrospective effect in the absence of a provision to that effect. The rules were amended long after this petition had been filed and long after the period of limitation for an appeal had expired. Therefore the objection that the petition does not lie by reason of the amendment of the rules must be rejected.

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[Then their Lordships dealt with the case on the merits.]

K. S. *Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MOCKETT AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

Messrs. Bosotto Brothers, Limited, Madras .. *Respondents.*

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Commissioner of Income-tax, Madras *v.* Bosotto Brothers, Ltd., Madras.

Indian Income-tax Act (XI of 1922), Ss. 9 and 10 (2) (vi)—Assessee running hotel business—Letting out of hotel building to another for carrying on a similar business—Claim by assessee of deduction for depreciation on building, furniture, etc—Claim allowable—Construction of sections in favour of assessee, as against Crown.

Where the assessee, a company, carrying on a hotel business in Madras, subsequently built and fitted up a hotel building in Ootacamund and carried

* O. P. No. 301 of 1938. 23rd October, 1939.

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on a hotel business there till 1934, but thereafter leased the premises in Ootacamund to another firm to carry on a similar business and asked for deduction from tax for the depreciation on building and furniture of the Ootacamund hotel for the year 1937-38, claiming to be so entitled under S. 10 (2) (*vi*) of the Income-tax Act.

Held, that the case was governed by the Full Bench decision in *Mangalagiri Rice Factory* v. *Commissioner of Income-tax, Madras*, (1926) 51 M.L J. 360 (F.B.) and therefore, when the assessee, a limited concern, was permitted by the objects of the Memorandum of Association to let or rent the under-taking or any part of it, it was entitled to claim the deduction owing to depreciation.

Per *Krishnaswami Aiyangar, J.*—Being a taxing statute, the Income-tax Act, should receive a strict construction, that is, a construction in favour of the assessee, and not in favour of the Crown. If a case appears to be governed by either of two provisions in the Act, it is clearly the right of the assessee to claim that he should be taxed under that one, which leaves him with a lighter burden.

Reference under S. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras.

Case stated by the Commissioner of Income-tax, Madras, is as follows:—

I have the honour to refer the following case for the decision of the Hon'ble the Judges of the High Court under S. 66 (2) of the Income-tax Act (XI of 1922) herein after referred to as the Act.

2. The petitioners are a Limited Company carrying on business as hotel keepers in Madras within the jurisdiction of the Income-tax Officer, Madras II Circle. They also own a building at Ootacamund, which they have let to Messrs. Davis & Co., who run a hotel in the premises.

3. For the year of assessment 1937-38 (previous year ended 31st August, 1936) the petitioners were assessed on a total income of Rs. 5,478 made up of Rs. 1,000 from property (Ootacamund building), Rs. 4,238 from business (Hotel in Madras) and Rs. 240 from other sources (representing rent of furniture in the Ootacamund building). In determining this income the Income-tax Officer disallowed a sum of Rs. 2,450 claimed by the petitioners as depreciation on the building and furniture at Ootacamund. The present reference arises out of this disallowance.

4. The building at Ootacamund is equipped with furniture suitable for running a hotel business and the petitioners themselves ran a hotel there for some years. Later on, however, they discontinued it and let the building on a monthly rent of Rs. 120 to Messrs. Davis & Co., who have been running a hotel of their own in it since then. The rent of Rs. 1,440 realised in respect of this building is for the building with the furniture. The petitioners

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included the whole of this sum in their receipts from business and claimed depreciation on the original cost of the buildings and furniture at the rates allowed by the rules made under the Act. The Income-tax Officer considered that the rent of the building was chargeable to income-tax as income from "property" under S. 9 of the Act and that the rent of furniture was income falling under S. 12 ("other sources"). He took Rs. 1,200 as the rent (annual value) of the building and allowing a deduction of one-sixth for repairs, determined an income of Rs. 1,000 under the head "property" treating the balance of Rs. 240 the rent of furniture as income from "other sources" He disallowed the claim for depreciation as no such allowance was admissible under S 9. The petitioners contended that the rent of the building should be regarded as income from business and depreciation allowed on its original cost on the analogy of the ruling in *S. Roy Chowdhury* v. *Commissioner of Income-tax, Bengal*[1], but the Income-tax Officer disallowed this claim as he held that the property was not used for the purpose of the business carried on by the petitioners. A copy of the Income-tax Officer's order is appended and marked Ex. A.

5. The petitioners' appeal to the Assistant Commissioner was unsuccessful. A copy of the appellate order is filed as Ex. B.

6. The petitioners now require me to allow the claim for depreciation or, in the alternative, to refer to the High Court the question set out in their application a copy of which is filed as Ex. C. As I do not see my way to grant any relief under S. 33 of the Act I refer the question of law arising in this case in the following form for the decision of their Lordships:

"Whether in this case the petitioner is entitled to an allowance for depreciation under S 10 (2) (*vi*) of the Act in respect of their Ootacamund building let out to Messrs. Davis & Co."

7. S. 10 (2) (*vi*) of the Act lays down that in computing the profits or gains of *any business carried on by an assessee* an allowance shall be made in respect of depreciation of buildings, machinery, plant and furniture, which are the property of the assessee and are *used for the purpose of the business.* The words underlined make it clear that for a claim to depreciation to be admissible the building, etc., should be used for the purpose of the business carried on by the assessee himself. In this case the petitioners did not carry on any business in their building at Ootacamund in the year of account. Nor is it contended that the petitioners carry on a business of letting suitably equipped buildings for use as hotels. In fact, the petitioners have themselves stated in their

1. (1935) I.L.R. 62 Cal. 804: 8 I.T.C. 177.

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petition that "owning buildings for the purpose of letting the same as owner of the property is not within the scope of the power vested in the company under the constitution". The income which the petitioners derive from letting out the building to Messrs. Davis & Co., is therefore not income from business but is income from the ownership of property and falls to be assessed under S. 9 of the Act. This section provides for the payment of tax by an assessee under the head "property" in respect of the *bona fide* annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner. This annual value is subject to certain allowances which are mentioned in cls. (*i*) to (*vii*) of sub-S. (1) but depreciation is not one of these allowances. The refusal of the Income-tax Officer to admit the claim for depreciation on the Ootacamund building of the petitioners is therefore correct. The decision in *S. Roy Chowdhury* v. *Commissioner of Income-tax, Bengal*[1], on which the petitioners seem to rely relates to a different set of facts and cannot, in my opinion, be applied to the facts of this case. I consider therefore that the question should be answered in the negative.

K. V. Sesha Aiyangar for Petitioner.

M. Subbaraya Aiyar for Respondents.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—The assessee is a company carrying on a hotel business. It was formed in 1928 and took over a hotel in Madras. Subsequently, the assessee built a hotel in Ootacamund and carried on a hotel business there until 1934. These facts do not appear in the statement of the case, but they have been mentioned in argument, and they are not in dispute. The assessee found that its business in Ootacamund was not profitable, and in 1934, leased the premises and its furniture and fittings to a firm named Davis and Company for the purpose, to quote from the order of the Income-tax Officer, "of running a hotel". Messrs. Davis and Company have since then carried on this hotel business. For the assessment year, 1937-38, the assessee desired to deduct from its income the sum of Rs. 2,450 as a depreciation on the building and furniture at the Ootacamund hotel, the assessee company's contention being that it was entitled to this deduction under the provisions of S. 10 (*2*) (*vi*) of the Indian Income-tax Act, 1922. The Income-tax Officer refused to allow the deduction and held that the hotel in Ootacamund must be regarded as property and as such, was

1. (1935) I.L.R. 62 Cal. 804 : 8 I.T.C. 177.

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assessable only under S. 9 of the Act. His decision was in turn concurred in by the Assistant Commissioner and the Commissioner. The assessee being dissatisfied asked the Commissioner to refer the matter to this Court as it involved a point of law and the Commissioner has in consequence framed this question:

"Whether in this case the petitioner is entitled to an allowance for depreciation under S. 10 (2) (*vi*) of the Act in respect of their Ootacamund building let out to Messrs. Davis and Company."

Mr. Sesha Aiyangar has very properly conceded that when the assessee was running a hotel it was entitled to be assessed under S. 10 of the Act, and therefore entitled to the deduction allowed by sub-S. 2, cl. (*vi*) but he says inasmuch as the assessee has ceased to utilise the building itself for the purpose of a hotel business the building must be regarded as property and not part of the assessee's business. In this connection, I would point out that cl. 3 (*j*) of its memorandum of association gives the assessee power to let on rent the undertaking or any part of it, and therefore the letting of the Ootacamund hotel was part of the company's business. In my opinion the case is governed by the Full Bench decision of this Court in *Mangalagiri Rice Factory* v. *Commissioner of Income-tax, Madras*1, which was followed by the Calcutta High Court in *S. Roy Chowdhury* v. *Commissioner of Income-tax, Bengal*2. Sir Coutts-Trotter, C. J. and Krishnan and Beasley, JJ., had to consider the case of a company incorporated for the purpose of milling rice. The company's articles of association gave it power to lease out its buildings and there was a clause which stated that:

"If it was deemed beneficial to the company with reference to circumstances it might lease or give its factory for contract."

Therefore, the powers of the company were powers which the assessee in the present case possesses. The company let its mill, and the question was whether it was entitled to the deductions allowed by S. 10 (2) (*vi*). It was held that it was. In his judgment Beasley, J., observed:

"The company could either work the mill itself or could let it out to others to do so. One is the business of milling and the other is the business of letting out the mill for others to do so. Both, in my view, are equally a business, and my answer, therefore, to the reference would be that the company is entitled to a deduction for depreciation of the buildings, machinery and plant."

I can see no difference in principle between the letting out of a rice mill and its machinery and the letting out of a building

1. (1926) 51 M.L.J 360: 2 I.T.C. 251 (F.B.).
2. (1935) I.L.R. 62 Cal. 804: 8 I.T.C. 177.

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built, fitted for the purposes of a hotel business. As I have indicated, the assessee here has the power to carry on the hotel business or lease the whole or part of its undertaking. It has leased a part of its undertaking and if it had leased its two hotels, there would have been no difference between the present case and the two cases which I have mentioned. I do not consider that the fact that it has only let out one of the hotels and not the two can make any difference, the assessee having full power to let out the whole or a part of its undertaking. As I regard the case as being governed by *Mangalagiri Rice Factory* v. *Commissioner of Income-tax, Madras*[1], I would answer the reference in the affirmative. The assessee, having succeeded in the reference, is entitled to its costs, Rs. 250 and the refund of its deposit of Rs. 100.

Mockett, J.

Mockett, J.—I entirely agree. In my view, the decision of the Income-tax authorities was based on the information that what was let in this particular case was "a building". In the decision, *Mangalagiri Rice Factory* v. *Commissioner of Income-tax, Madras*[1], it will be seen that the company in that case had their powers separately divided with regard to their properties. They were empowered to lease out buildings and vacant sites of lands, and by a separate provision they were empowered to lease or give their factory for contract. In this case, that power is contained in the memorandum of association, cl. 3 (*j*), not separately as in the above case. Now, what did Davis and Company get in this case? In my view, they received a lease of the undertaking of a hotel known as a hotel business. In the case to which reference has been made, it was a rice mill business. Now, the equipment of a rice mill is naturally different to the equipment of a hotel. The kitchen, lounges, bars, public rooms, sleeping rooms, bath rooms, and lavatories of a hotel naturally find no place in a rice mill any more than the machinery of a rice mill finds a place in a hotel. But nonetheless, one is just as much a business as the other. It seems to me that when that view is borne in mind, the difficulties which the Income-tax authorities found in this case largely disappear, because what Bosotto Brothers, Limited, leased was this hotel business in Ootacamund, and if that is so, the position is exactly covered by the decision in *Mangalagiri Rice Factory* v. *Commissioner of Income-tax, Madras*[1]. I have only to add

1. (1926) 51 M.L.J. 360: 2 I.T.C. 251 (F.B.).

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that I cannot for a moment accept the position that if an assessee has one undertaking, be it a rice mill or be it a hotel, and if he leases that undertaking it comes under S. 10, but if he owns two undertakings and leases only one of them, it comes under S. 9. The reasoning for the position that the latter position comes under S. 9 seems to me without any foundation whatever. For these reasons and for the reasons given by my Lord the Chief Justice I consider that the answer to the reference should be in the affirmative.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—It is not without some hesitation that I subscribe to the opinions just now expressed by my Lord and my brother, Mockett, J. I take the facts to be that the building which has formed the subject-matter of the contest was built and fitted up by the assessee to be utilised for the running of a hotel bu iness, that the assessee actually ran such a business there for some years until he closed it in 1934. After the business was discontinued, the assessee let the building on a monthly rent of Rs. 120 to Messrs. Davis and Company who have been running a hotel of their own in it si. ce then. I also take that it was for the purpose of running a hotel that the building was leased. In spite of the fact that the building was not used by the assessee for purposes of *his* business during the year of account, he claims that an allowance should be made out of his gross business income for the depreciation of his building during the year of account. It is claimed on his behalf, that he is entitled to the allowance under S. 10 (2) (*vi*).

The question is whether the proper section to be applied to the case is S. 9 as claimed by the department or S. 10 of the Indian Income-tax Act, 1922, as claimed by the assessee. On behalf of the department a suggestion was made but not persisted in, that S. must first be resorted to before considering the applicability of S. 10 It seems to me that if a case properly comes within S. 10, there is no question of having to choose between that section and some other section in the Act. Being a taxing statute, the Income-tax Act should receive a strict construction, that is, a construction in favour of the subject, and not in favour of the Crown. If a case appears to be governed by either of two provisions, it is clearly the right of the assessee to claim that he should be taxed under that one which leaves him with a lighter burden.

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Krishnaswami Aiyangar, J.

S. 10 lays down the method to be adopted for arriving at the tax payable by an assessee under the head "business" and says that the tax should be payable in respect of the profits or gains of any business carried on *by him*. In computing such profits and gains certain allowances have necessarily to be made as directed by the various clauses of sub-S. (2). These allowances are peculiar to the case where income from a business is assessed, other rules being made for the computation of income from other sources.

It will be advantageous to set out the relevant portions of the section which throw light on the question at issue.

(1) "The tax shall be payable by an assessee under the head 'business' in respect of the profits or gains of any business carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely:—

(*i*) any rent paid for the premises in which *such business* is carried on . . . . . .

(*ii*) in respect of repairs, where the assessee is the tenant only of *the* premises and has undertaken the cost of such repairs . . . . . .

(*iii*) in respect of capital borrowed for the purposes of the *business* . . . .

(*iv*) in respect of insurance against risk of damage or destruction of buildings, machinery, plant, furniture, stocks or stores, *used for the purposes of the business*. . . . .

(*v*) in respect of current repairs to *such* buildings, machinery, plant or furniture. . . . . . .

(*vi*) in respect of depreciation of *such* buildings, machinery, plant or furniture being the property of the assessee. . . . . . ."

I have italicised the words which have a material bearing on the point under consideration. The meaning of the word 'such' in cl. (*vi*) is to be got by going back to cl (*iv*), and it is clear that a depreciation is to be allowed only if the buildings, machinery, etc., were used for the purposes of *the* business. Two conditions have to be satisfied by the assessee before he can claim depreciation:—

(1) The buildings, machinery, plant or furniture should be the property of the assessee;

(2) they must be used for the purposes of "the business".

The use of the definite article 'the' and of the word 'such' in these clauses makes it clear to my mind that the business contemplated in cl. (*vi*) of the section is the business carried on by the assessee and not by any person or persons other than the assessee, and that it is in respect of a building belonging to the assessee, and used for *his* business that he can claim a depreciation allowance.

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Can it be said in the present case that the Ootacamund building was used in the year of account for the purposes of 'the business', that is the business of the assessee? *Prima facie* I should be inclined to take the view that the business carried on by Messrs. Davis and Company is not the business of the assessee, but is really the business of Messrs. Davis and Company only. The position, I concede, may be different if instead of the building, fitted up as this building has been fitted up, being leased, the business itself had been leased as a running concern. The Act, it seems to me, contemplates the business as being something different from the buildings, the plant, machinery or furniture which may be used for the purpose of the business. It is as different from any of these things, as for instance the capital embarked on it, or the establishment with which it is carried on. The term business as used in the section denotes, I think, an abstract and intangible thing, quite apart from any of these physical adjuncts, and quite apart also from such other elements as the goodwill, the business connections, the business reputation and so on. In my judgment it is an entity different from any of these things and has to be so understood in the Act. A running business can be leased, as it can be sold, as such together with the buildings where it is carried on. If the lessee carries on the business leased to him, using the s me premises together with the fittings and furniture though for the purposes of his own business there may be some ground—even of this I am by no means sure—for saying that the assessee is still carrying on the business, through the agency of the lessee, so as to attract the provisions of S. 10 (*2*) (*vi*).

But the position here is different. In the premises leased, it is not denied that the lessees Messrs. Davis and Company are carrying on their own business, and it is not claimed that the assessee leased the business as a running concern either. The business in question cannot be regarded even in a theoretical and legal sense as the business of the assessee and must in my opinion be held to be the business of the lessees. Can it then be said that S. 10 (2) (*vi*) applies to such a case? It is this point which created a considerable amount of difficulty in my mind and I should have, if it were open to me to do so, been inclined to answer this question in the negative. But I agree that the decision of the Full Bench in *Mangalagiri Rice Factory* v. *Com-*

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missioner of Income-tax, Madras[1], binds me and leaves me no option. There, the company which owned a rice mill leased it to a lessee and the latter carried on his own business in the premises but with the plant and machinery of the lessors. There is nothing in the report of the case to show that the lease was of the business as a running concern and there was therefore no warrant for regarding the business that was run by the lessee as the business of the assessee. Still, the Court held that S. 10 (2) (*vi*) applied for reasons, which are, if I may say with great respect, clearly enough stated in the judgment of Beasley, J., as he then was. The learned Judge pointed out,

> "the company could either work the mill itself or could let it out to others to do so. One is the business of milling and the other is the business of letting out the mill for others to do so. Both, in my view, are equally a business".

In the present case also, it would appear from cl 3(*j*) of the Memorandum of Association that the assessee is empowered to let on rent the undertaking or all or any of the property for the time being belonging to the assessee. The letting of the property in this case must be held, according to the decision in the case cited, as part of the business of the assessee in this case also. Bound as I am by this decision, I am constrained to answer the question referred to us in the affirmative. According to the Full Bench decision the question in each case will be whether the leasing of the property can be regarded as coming within the scope of the objects clause of the Memorandum of Association of the assessee company. In that case, as in this, the assessee was a limited company.

I may perhaps add that there is no objection under the Act either to an individual or a company carrying on business and also owning property. The income from each of these sources will then be separately assessed under different provisions. In the first case, the section to be applied will be S. 10 (2) (*vi*) and in the second case the proper section applicable will be S. 9. The assessee will have to pay the aggregate of the taxes under both heads.

Question answered in the affirmative.

K. C.

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1. (1926) 51 M.L.J. 360: 2 I.T.C. 251 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— MR. JUSTICE WADSWORTH.

A. Ramu Mudali .. *Appellant* (2nd Respondent —2nd Judgment-debtor)*

v.

Shobagmul Sowcar and another .. *Respondents (Petitioners— Decree-holders).*

Ramu Mudali *v.* Shobagmul Sowcar.

Partnership Act (IX of 1932), Ss 69 and 74—Decree on promissory note passed without contest—Execution of decree—Objection that decree not valid as plaintiffs were members of unregistered firm—If can be taken in execution.

In bar of execution of a decree passed without contest on a promissory note (dated 15th March, 1933, the plaint in which was filed on 27th June, 1935), the defendant raised the objection that the suit was bad and the decree a nullity because the plaintiffs at the time of the filing of the suit constituted an unregistered partnership.

Held, the suit out of which the decree arose is not one barred under S 69 of the Partnership Act as S 74 excludes from the operation of the Act remedies accruing before the commencement of the Act. Any lack of jurisdiction which may have existed in the Court which passed the decree could only be ascertained with an amount of research and investigation which would be beyond the functions of an executing Court Where the executing Court had an apparently good decree to execute, it is not entitled to go into an elaborate enquiry into the legality of that decree,—an enquiry which demands the adducing of evidence which was not put before the trial Court before which the objection should have been raised.

Appeal against the order of the District Court of North Arcot dated the 11th January, 1937 and passed in A. S. No. 295 of 1935 preferred against the order dated 11th November, 1935, in E. P. No. 1426 of 1935 in O. S. No. 317 of 1935, District Munsif's Court, Thiruvannamalai.

Ch. Raghava Rao for Appellant.

E. Vinayaka Rao for Respondents.

The Court delivered the following

JUDGMENT.—The appellant was the second defendant in a suit on a promissory note which was decreed without contest. In bar of execution of that decree, he raised the objection that the suit was bad and the decree a nullity because the plaintiffs at the time of the filing of the suit constituted an unregistered partnership. The plaint filed on 27th June, 1935, describes the plaintiffs by their names only and contains no allegation that the claim is made on behalf of the firm or that the promissory note was executed to the firm, nor does it pray for a decree in favour

* C.M.S.A. No. 124 of 1937. 18th September, 1939.

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of the firm. But cl. 2-*a* of the plaint avers that the two plaintiffs are "joint partners", that the first plaintiff is the managing partner of the firm and that therefore he is signing the plaint on behalf of the second plaintiff also. Thus the fact that the plaintiffs constitute a firm is pleaded merely to show that the first plaintiff has authority to represent the second plaintiff. The plaint is not in other respects drafted as a plaint in a suit filed by a firm. The decree however has altered the cause title and describes the plaintiffs as "Shobhagmul Sowcar and Ramlal Sowcar by managing partner, first plaintiff" and the same cause title is repeated in the execution petition. The promissory note upon which the suit is brought is dated 15th March, 1933, a date of some importance with reference to the date of the commencement of the Partnership Act.

The objection raised by the appellant is briefly that under S. 69 of the Partnership Act no suit could lie by an unregistered firm in respect of a contract and therefore the Court had no jurisdiction to entertain this suit, the decree is a nullity and the executing Court should have refused to execute it. Two questions obviously arise. One is, whether this decree is one passed without jurisdiction and the other is, whether this is a question which the executing Court is entitled to go into. I will deal with the second question first.

Undoubtedly, the general rule is that the Court which executes a decree must take it as it stands and cannot entertain an objection as to its legality or propriety *Kalipada Sarkar* v. *Hari Mohan Dalal*[1]. This general rule is subject to exceptions; but it has been generally recognised by the Courts that exceptions to the rule should be restricted to certain categories which have been recognised by the Courts and that the Courts should be very chary of recognising fresh exceptions. Certain exceptions are widely recognised. It has always been recognised by this High Court that an executing Court can refuse to execute a decree if it is one apparently passed without jurisdiction. Even this exception has not been recognised everywhere—vide *Nathan* v. *Samson*[2], but it certainly holds force so far as Madras is concerned. If, therefore, on the face of the decree, it can be seen that the Court which passed the decree had no jurisdiction, or if there are apparent reasons for doubting its jurisdiction to

1. (1916) I.L.R. 44 Cal 627.
2. (1931) I.L.R. 9 Rang. 480 (F.B.).

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pass that decree, the executing Court can go into the question whether or not the decree is a nullity. The extent to which the executing Court can go into the validity of a decree, which is not on its face one passed without jurisdiction, is very limited.

One class of cases has been recognised by this High Court, namely, cases in which the executing Court contemplates a sale of property which, by a provision in law enacted for the benefit of the public generally, is inalienable. Cases under this class relate, generally, to sales in violation of the provisions of the Madras Impartible Estates Act or sales in violation of Act III of 1895 governing service inams. It may, however, be doubted, whether this class of cases is really an exception to the general rule; for the grounds of the executing Court's enquiry into the executability of the decree are not really grounds relating merely to the decree itself, but rather to the power of the Court to effect the alienation which the execution contemplates. That is to say, the basis of the executing Court's right to go into the nature of the decree is really not the illegality of the decree, but the Court's own legal duty not to carry out an alienation which offends against a prohibition laid down for public reasons by statute. In other words, it is not really a power to question the decree, but a power residing in the executing Court to make sure that its own act is not illegal. I therefore venture to doubt whether this class of cases is really an exception to the general rule that the Court should not go behind the decree except on grounds of apparent lack of jurisdiction.

A further class of cases relates to decrees against persons under a disability who are alleged not to have been properly represented. There is a difference of opinion in the various Courts on the question whether an executing Court can go into the validity of the decree on these grounds. It is not necessary for me to go into the question for the purpose of the present case.

A further possible exception relates to decrees against dead men. Here again, it is by no means universally acknowledged that an executing Court can go into the question whether the decree was passed against a person already dead. But even if the power of the executing Court to make such an enquiry be recognised, it is again perhaps not so much an enquiry into the validity of the decree, as an enquiry into the existence of any

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properties against which a decree can be executed. For, if the defendant was dead at the time when the decree was passed, his properties would have already passed to his heirs and all that would remain against which the decree could be executed would be the person of a man already defunct. Looked at from that angle, it is not really an exception to the rule that the executing Court cannot go into the validity of the decree apparently passed with jurisdiction.

An attempt has been made to argue in the present case that there is a prohibition against the passing of decrees in favour of unregistered partnerships—a matter which seems to me rather doubtful, for all we find in S. 69 is a prohibition against the filing of suits by unregistered partnerships. It has, however, been argued that from the terms of sub-cl. 4-*b* of S. 69, one might infer a general prohibition against the entertainment of execution proceedings by unregistered partnerships. This seems to me to be to deduce far too much out of the special provision relating to Small Causes Court proceedings.

Now this decree, on its face, is not one apparently passed without jurisdiction. Certainly on its face, it appears to be a decree in favour of the partnership, though, as I have already indicated, no such decree was expressly prayed for. But there is nothing on the face of the decree to show that the partnership was unregistered. True that in the counter-affidavit to the execution petition, it was contended that the partnership was unregistered and, no reply having been given and there being no evidence to the contrary, one may infer that this contention was correct. But the fact remains that the decree was not one apparently passed without jurisdiction. I doubt also whether it can be said that a Court has no jurisdiction to pass a decree in favour of an unregistered partnership. The most that can be said is that, in certain circumstances, a suit by an unregistered partnership is liable to be rejected *in limine*. The circumstances are (*a*) that the partnership in question is not a partnership of the non-contractual kind constituted by a Hindu joint family (*vide* S. 5 of the Act); (*b*) that the proceeding in question is not one saved by the special provisions of S. 74 of the Act.

Now in the present case, it appears that the two plaintiffs are Hindus closely related to one another.

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The learned District Judge has inferred that in all probability they do not constitute a joint family firm. But the matter not having been put into issue in the suit, it cannot, in my opinion, be said that the contention based on S. 5 would not have been open to the plaintiffs had the objection been taken, as it should have been taken, at the time of the trial. Further, the debt with which we are concerned is a promissory note dated 15th March, 1933, said to be in respect of a family debt, the origin of which we do not know. The Partnership Act is peculiar in that the commencement of the Act for the purpose of S. 69 is a year later than the commencement for the purpose of the rest of the Act. The Act generally came into force on 1st October, 1932. S. 69 came into force on 1st October, 1933. It is, I think, settled so far as Madras is concerned, and also in Rangoon, that a suit instituted after 1st October, 1933, by an unregistered firm in respect of a debt arising before the commencement of the Act is one to which S. 69 does not apply. The terms of S. 74 (*b*) exclude from the operation of the Act any legal proceeding or remedy accruing before the commencement of the Act in respect of any right, obligation or liability which, with reference to sub-cl. (*a*), was "acquired, accrued or incurred before the commencement of the Act." Now it has been held that the remedy which accrues before the commencement of the Act is one which accrues before the date on which S. 69 comes into force, *Soonoiram* v. *Junjilal*[1] and *Girdharilal Son & Co.* v. *Kappini Gowder*[2]. It is to my mind difficult to postulate a different date for the commencement of the Act when dealing with the liability in respect of which the remedy arises; for, if a man had a right on the 30th September, 1933, to bring a suit in respect of a debt incurred after the 1st October, 1932, one would naturally infer that that remedy would be protected by the terms of S. 74, cl. (*b*), the object of which, apparently, is to give the Government time to frame the necessary rules and to give the parties time to carry out the necessary formalities.

I am, therefore, inclined to the view that the suit out of which this decree arose is not one barred under S. 69 of the Partnership Act. Whether that view be correct or not, it seems to me clear that any lack of jurisdiction—if lack of jurisdiction be the proper term—which may have existed in the

1. A.I.R. 1938 Rang. 273 (F.B.). 2. (1938) 2 M.L.J. 44.

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Court which passed this decree, could only be ascertained with an amount of research and investigation which would be beyond the functions of an executing Court. The executing Court had an apparently good decree to execute and it is not, in my opinion, entitled to go into an elaborate enquiry into the legality of that decree, an enquiry which demands the adducing of evidence which was not put before the trial Court before which the objection should have been raised.

In the result, therefore, I hold that the decision of the District Judge is correct and I dismiss the appeal with costs.

Leave refused.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUNHI RAMAN.

Mattapalli Appa Rao .. *Petitioner* (Appellant)*

v.

Ch. Ramamurthi and others .. *Respondents (Respondents and Nil).*

Appa Rao v. Ramamurthi.

Provincial Insolvency Act (III of 1907), S. 66 (2)—Insolvency of a Hindu father—Daughter's marriage expenses—If entitled to preference.

There is no authority for holding that the insolvent has a right to claim out of his estate the expenses that he contemplates incurring for celebrating the marriage of his daughter. Such a claim cannot be made as a matter of right. The proper course for the insolvent is to ask for an increase in his allowance for the period during which he contemplated celebrating the marriage of his daughter.

Petition under S. 75 of Provincial Insolvency Act, praying the High Court to revise the order of the District Court of East Godavari at Rajahmundry dated 7th December, 1937 and made in C.M.A. No. 40 of 1937 preferred against the order of the Court of the Subordinate Judge of Cocanada dated 28th August, 1937 and made in I. A. No. 204 of 1937 in I.P. No. 29 of 1932.

V. Viyyanna for Petitioner.

D. Narasaraju for Respondents.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition arises out of certain insolvency proceedings pending in the Court of the learned Subordinate Judge of Cocanada (I. A. No. 204 of 1937

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*C. R. P. No. 714 of 1938. 9th November, 1939.

Appa Rao v. Ramamurthi.

in I. P. No. 29 of 1932). The petitioner was adjudged insolvent and all his properties became vested in the Official Receiver of East Godavari. On an application made by the petitioner under S. 66 (2) of the Provincial Insolvency Act, it is stated that a monthly allowance of Rs. 50 out of the estate has been made in his favour by the learned Subordinate Judge. While this order was in force, the petitioner presented another application for an allotment of Rs. 4,000 to be made for celebrating the marriage of his daughter who had just attained the age of 14 years. It was conceded in the Subordinate Judge's Court that this amount included a sum of Rs. 2,000 which petitioner wanted for 'katnam' (dowry). The balance of Rs. 2,000 was claimed by him for meeting the actual expenses of the marriage. The learned Subordinate Judge has held that in any event, the petitioner was not justified in claiming Rs. ?,000 to enable him to give it as dowry at the time of the marriage of his daughter and that it was not open to him to claim the balance of Rs. 2,000 under S. 66 (2) of the Provincial Insolvency Act. In the course of his order the learned Subordinate Judge has recorded that in his opinion, a sum of Rs. 500 would be sufficient for meeting the expenses of the marriage of the petitioner's daughter. This however was only an observation made by him in the course of his order.

On appeal to the learned District Judge of East Godavari, the order made by the learned Subordinate Judge was confirmed and the appeal was dismissed. It is against this order that the present revision petition is filed.

The learned advocate for the petitioner contends that the property of the insolvent must be deemed to have vested in the Official Receiver subject to all the liabilities that could have been enforced against it in the hands of the insolvent himself. In support of this proposition he has cited certain English decisions where the view taken is that the trustee in bankruptcy stands in the position of the bankrupt, that he takes the property of the insolvent subject to rights of third parties and that he is in effect, the legal representative of the bankrupt. (Ex parte *Holthausen*: In re *Scheibler*[1], In re *Eastgate*: Ex parte *Ward*[2] and In re *Mapleback*: Ex parte *Caldecott*[3].) He has also cited the case reported in *Sheobaran Singh* v. *Kulsum-un-nissa*[4], where a

1. (1874) 9 Ch. Ap. 722.
2. (1905) 1 K.B. 465.
3. (1876) 4 Ch. D. 150.
4. (1927) 52 M.L.J. 658: L.R. 54 I.A. 204: I.L.R. 49 All. 367 (P.C.).

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right of pre-emption to which a third party was entitled with regard to certain property of the insolvent was enforced subsequent to insolvency. The substance of these decisions has been summarised in Mulla's commentaries on the Provincial Insolvency Act where the learned author states that the property which the Official Receiver takes is the property of the bankrupt exactly as it stood in his person with all its advantages and all its burdens.

The learned advocate for the respondent, on the other hand, argues, that according to Hindu Law the creditor's rights are recognised as supreme even as against the sons of the insolvent and that there is no warrant for the claim put forward on behalf of a daughter. He cites the decision reported in *Sundari Ammal* v. *Subramania Aiyar*[1], in support of his contention. There a wife had expended moneys for celebrating her daughter's marriage and subsequently sued her husband for recovering the amount so expended but it was held that she was not entitled to recover. He also relies on the decision reported in *Jawahar Singh* v. *Parduman Singh*[2], where it is observed in the judgment that:

> "It is settled law that the debts contracted by a Hindu governed by Mitakshara school take preference over the right of maintenance of his wife and minor children"

In Mayne's Hindu Law at page 429, the case-law relating to this subject has been summarised:

> "In cases governed by the Mitakshara law a father may sell or mortgage not only his own share but also the share of his male issue in family property, for the purpose of satisfying antecedent debts of his own not incurred for any family necessity or benefit, provided they are not immoral or illegal, and the sale or mortgage may be enforced against his sons by a suit or proceedings to which they are not parties. . . . ."

A creditor may enforce payment of the personal debt of a father not being illegal or immoral, by attachment or sale of the entire interest of father and sons in the family property and it is not absolutely necessary that the sons should be parties either to the suit itself or to the proceedings in execution.

In view of these authorities, it is not possible for the petitioner to contend that the daughter is entitled as a matter of right to claim the amount mentioned in the petition from out of the estate of the insolvent as against the creditors of the insolvent. The application, as already stated, was presented under S. 66 (2) of the Provincial Insolvency Act. This clause of the

1. (1902) I.L.R. 26 Mad. 505. 2. (1932) I.L.R. 14 Lah. 399.

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section is worded as follows:

"The Court may from time to time make such allowance as it may think just to the insolvent out of his property for the support of himself and his family . . . . but such allowance may at any time be varied or determined by the Court."

It will be seen that the making of the allowance is left to the discretion of the Court. It is not possible to hold that an application like the present where a lump sum claimed on behalf of the insolvent for meeting the marriage expenses of his daughter will come strictly within the scope of this section. I am prepared to hold that under the category of "allowance for the support of himself and his family" the expenses that may be necessary for celebrating the marriage of the daughter of the insolvent may be brought. Therefore, the proper course for the petitioner to adopt is to ask for an increase in his allowance for the period during which he contemplated celebrating the marriage of his daughter. Such an application would be dealt with by the Court bearing in mind the considerations that ought to prevail in disposing of applications under S. 66 (2) of the Provincial Insolvency Act. The claim can certainly not be made as a matter of right for there is no authority for holding that the insolvent has a right to claim out of his estate the expenses that he contemplates incurring for celebrating the marriage of his daughter. In these circumstances, I am not satisfied that the view taken by the lower Courts is wrong. The petitioner may, if so advised, make an application for increasing the allowance already made to him by the learned Subordinate Judge but the petition that was filed by him in the learned Subordinate Judge's Court out of which this revision petition arises was clearly not sustainable. This Civil Revision Petition must therefore be dismissed. I make no order as to costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

R. Sami Naidu .. *Appellant** *(2nd Defendant)*

v.

Katha Goundan and another .. *Respondents (Plaintiff and 1st Defendant).*

Sami Naidu v. Katha Goundan.

Civil Procedure Code (V of 1908), O. 22, r. 12—Suit filed by an uncle on behalf of his nephew to get a decree of the Panchayat Court against his

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* S. A. No. 435 of 1935. 1st December, 1939.

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nephew set aside on the ground that he was minor—Minor actually major on date of decree as well as suit—Suit if can be allowed to be continued by the nephew.

A suit was filed by an uncle in the name of his nephew for the purpose of making it appear that the nephew was a minor on the date of a decree of the Panchayat Court against the nephew and to have the decree set aside. It was found that the plaintiff was a major on the date of the decree as well as suit.

Held, if the plaintiff was a major when the suit was filed, then clearly no other person had a right to file the suit on his behalf and the suit had to be dismissed. O. 22, r. 12, Civil Procedure Code, does not contemplate the giving of an opportunity to a person who is not on record to continue the suit. That rule applies to a case where a suit has been filed by a minor who becomes a major during the course of the trial.

Appeal against the decree of the Court of the Subordinate Judge of Vellore in A. S. No. 95 of 1934 preferred against the decree of the Court of the District Munsif of Tirupattur in O. S. No. 94 of 1933.

A. Viswanatha Aiyar and *A. Ramaswami Aiyar* for Appellant.

V. T. Rangaswami Aiyangar and *T. T. Vijayaraghavan* for Respondents.

The Court delivered the following

JUDGMENT.—One Chinna Budha Goundan brought a suit purporting to be on behalf of his minor nephew Katha Goundan to set aside the decree of the Chinnasamudram Panchayat Court in Suit No. 14 of 1931 against the plaintiff and another on the grounds of fraud and that he was a minor at the time of the plaint, as well as for other reasons, the plaintiff's uncle even saying that he had no knowledge of the suit at all. No less than nine issues were framed, and the District Munsif of Tirupattur found that there were no grounds at all for setting aside the decree and that the plaintiff was a major at the time of the passing of the decree. He accordingly dismissed the suit. In appeal, the Subordinate Judge of Vellore held that the plaintiff was a minor at the time of the filing of the suit and that even if the finding of the District Munsif had been correct he ought to have given the nephew Katha Goundan an opportunity of continuing the suit in his own name.

On the question of minority, the plaintiff's uncle examined three witnesses. P. W. 1 said nothing at all about the plaintiffs'

age. P. W. 2, Katha Goundan's grandfather, did nothing more than file a horoscope of another grandson by another daughter and say that the plaintiff was six months older than that grandson. The lower appellate Court relied on that horoscope; but as nobody was able to speak to the correctness of the horoscope, it was not proved and was of no value. P. W. 3 said nothing at all in examination-in-chief about the age of the plaintiff; but strangely enough he was questioned about the plaintiff's age in cross-examination. The answers to the questions in cross-examination afford the only evidence in this case in support of the plaintiff's claim that he was a minor. That answer was:

"I have a son born in Dunmati year, 11 years ago. He is junior to the plaintiff by seven years."

Dunmati ran from about April, 1921, to March, 1922. If the plaintiff was born seven years before that he was born between April, 1914 and March, 1915. The date of the decree was September, 1931; so that if the evidence of P. W. 3 is strictly correct, the plaintiff was about 17 years of age when the decree was passed. There can be no doubt that the burden of proof with regard to minority or majority is definitely on the person who asserts it; and the plaintiff was bound to strictly prove that he was a minor at the time of the filing of the suit in the Panchayat Court. This one sentence given by a villager who must have had very vague notions of times and years cannot be said to be evidence that a Court could accept to discharge the burden lying upon the plaintiff. I feel no doubt at all that the learned District Munsif was quite right in holding that there was no reliable evidence that the plaintiff was a minor at the time when the decree was passed; and it is surprising that the learned Subordinate Judge should, on such slender grounds, have seen fit to disagree with the trial Court.

If the plaintiff was a major at the time of the passing of the decree, then *a fortiori* he was a major at the time of filing the present suit. The suit was presumably filed by the uncle in the name of his nephew for the purpose of making it appear that Katha Goundan was very much a minor on the date of the decree of the Panchayat Court. If the plaintiff was a major when the suit was filed, then clearly no other person had a right to file the suit on his behalf; and the suit had therefore to be dismissed. O. 22, r. 12, Civil Procedure Code, which presumably the learned Subordinate Judge had in mind, does not

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contemplate the giving of an opportunity to a person who is not on record to continue the suit. That rule applies to cases where a suit has been filed by a minor who becomes a major during the course of the trial. The suit was therefore rightly dismissed by the District Munsif.

The appeal is therefore allowed and the decree of the District Munsif restored. There will be no order as to costs in this Court or in the lower appellate Court.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Thatathil Nayippatiyil Raman Adiyoty .. *Appellant* (1st Defendant)*

v.

Chirikandoth Kunnath Kaitheri Kannan Nambiar and another .. *Respondents (1st Plaintiff and 2nd Defendant).*

Raman Adiyoty *v.* Kannan Nambiar.

Civil Procedure Code (V of 1908), S. 144—Payment of decree amount by a junior member of a tarvad under O. 21, r. 89 to have the sale of tavazhi property in execution set aside—Reversal or setting aside of decree—Claim for restitution—Sustainability—Indian Contract Act, S. 72—Relief under if can be awarded.

None of the decisions goes the length of holding that, if a judgment-debtor or any other person bound by a decree makes a deposit under O 21, r. 89 to have a sale of his property held in execution set aside, the claim for restitution, made either under S. 144, Civil Procedure Code, or under the general law after the decree has been reversed in appeal or set aside in a suit brought for the purpose, is unsustainable. Such a case would clearly be one for awarding relief under S. 72 of the Indian Contract Act.

Case-law discussed.

Appeal against the decree of the District Court of North Malabar in A. S. No. 101 of 1935 preferred against the decree of the Court of the District Munsif of Kuthu Paramba in O. S. No. 201 of 1934.

O. T. G. Nambiar for Appellant.

C. S. Krishnamurthi Aiyar for Respondents.

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* S. A. No. 453 of 1936. 31st August, 1939.

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The Court delivered the following

JUDGMENT.—This is an appeal by the first defendant against the decree of the lower Court directing him to refund a sum of Rs. 423-15-6 with interest to the first respondent.

The facts giving rise to the appeal may be briefly stated. The respondents form a tavazhi tarvad of which the second respondent is the karnavan. The appellant sued the second respondent in O. S. No. 912 of 1926 in the District Munsif's Court at Kuthuparamba and obtained a decree for payment of money against him personally and as karnavan. In execution of that decree, certain properties belonging to the tavazhi were attached and brought to sale. The first respondent who was then a minor instituted through his next friend O. S. No. 843 of 1927 in the same Court for a declaration that the decree obtained by the appellant against the second respondent as karnavan in O. S. No. 912 of 1926 referred to above was a fraudulent and collusive decree based upon debts which were not real but had been fictitiously put forward and therefore not binding on the tavazhi tarvad. Pending this suit, the first respondent applied for a temporary injunction restraining the appellant from proceeding with the execution of the decree in O. S. No. 912 of 1926 against the properties of the tavazhi. But the injunction was refused and an appeal against such refusal also failed. The properties of the tavazhi were then sold in execution in December 1927 and the proceedings were adjourned to January 1928 for confirmation of the sale. In the meantime, the first respondent with a view to avert such confirmation and avoid further complications, applied under O. 21, r. 89, Civil Procedure Code, to set aside the sale, depositing the amount as required by the rule for payment to the decree-holder and the auction purchaser, and the sale was accordingly set aside. On the very next day, he applied to the Court for issue of an order withholding payment to the decree-holder of the amount deposited until his suit, O. S. No. 843 of 1927, was decided. This application however was rejected and the amount due under the decree in O. S. No. 912 of 1926 was paid to the appellant in March, 1928. The first respondent's suit, O. S. No. 843 of 1927, was dismissed by the trial Court in August, 1929, but was decreed on appeal in March, 1931, the appellate Court having found that the decree in O. S. No. 912 of 1926 was vitiated by fraud and collusion and based upon debts which were not real but

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fictitious. Thereupon, the first respondent applied under S. 144, Civil Procedure Code, for restitution of the amount deposited by him into Court and paid to the appellant. Though the Court finally dealing with that petition found that the first respondent was entitled to a refund in the circumstances of the case, it dismissed the petition on the technical ground that the remedy by application under S. 144 of the Code is available only to a person who is actually a party to the decree which has been varied or reversed, and that the first respondent's only remedy was to sue for the refund of the amount. Hence this suit.

Both the Courts below have decreed the plaintiffs' claim on the ground that the payment made by the first respondent was, in the circumstances of the case, one made under compulsion of law and the decree in O. S. No. 912 of 1926 having been set aside as not binding on the tavazhi tarvad, the first respondent was entitled to restitution of the amount which had been wrongfully recovered by the appellant under colour of that decree.

From the facts of the case stated above, it will be manifest that the payment was made under force of execution while the decree in O. S. No. 912 of 1926 was still outstanding against the tavazhi tarvad. It was obviously made to avert the confirmation of the sale which had just then taken place and to avoid further complications. The first respondent had taken various steps to prevent the attachment and sale of the properties which he has now succeeded in establishing that the appellant had no right to proceed against. After all such attempts failed, he applied under O. 21, r. 89 for setting aside the sale and in the affidavit in support of his application, he referred in detail to all the steps which he had been taking, though unsuccessfully for preventing the properties from being brought to sale in execution of the decree in O. S. No. 912 of 1926 which he said he was suing to set aside as a collusive decree, and wound up by stating that the application was filed and the deposit made for averting the completion of the sale. In these circumstances, there can be no pretence for saying that the payment by the first respondent was voluntary, and it would be a clear case, in my opinion, for awarding relief to the first respondent under S. 72 of the Indian Contract Act.

But the appellant's learned Counsel has contended before me that having regard to certain decisions of this and other High Courts on the nature and scope of an application under

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O. 21, r. 89, Civil Procedure Code, the payment by the first respondent which was made under that provision must be regarded as a voluntary payment which he is not entitled to recover from the appellant. The contention is somewhat startling, for, it is difficult to see why a payment which all the circumstances of the case clearly establish to have been made under compulsion of law should, by reason merely of the provision of law which allowed such payment to be made, be deemed to have become a voluntary payment. If the payment had been made after the attachment but before the sale of the properties, it is clear that it would be an involuntary payment which the appellant would be bound to refund in the events that have happened —see *Kanhaya Lal* v. *National Bank of India, Ltd.*[1] But as the payment was made at a later stage of the execution to set aside a sale of the properties, the payment, it is contended, must be regarded as voluntary. This would be the extraordinary result if the contention of the appellant's learned counsel were correct, but, it is urged, that such is the effect of certain decisions, some of them said to be binding upon me, which have therefore to be now examined. The line of cases relied on by the learned Counsel starts with *Narayan* v. *Amgauda*[2]. There in execution of a mortgage decree the mortgaged properties were sold and purchased by the decree-holder himself. A third party claiming the property to be his and not the judgment-debtor's paid the requisite amount into Court and got the sale set aside under O. 21, r. 89 and the amount was paid to the decree-holder. The persons who paid the money later brought a suit for the refund of the amount paid alleging that the properties sold belonged to him and the question arose whether it was a voluntary payment. Macleod, C.J. and Shah, J., held that it was and so could not be recovered. I may say at once that if the facts of the present case were similar, I should have respectfully declined to follow that decision. The gist of the reasoning was this: If the plaintiff had no interest in the property sold but was still allowed to pay the necessary sums into Court for getting the sale set aside under r. 89, he would clearly be a volunteer. Now, what is ordinarily sold at an execution sale is the right, title and interest, if any, of the judgment-debtor in the property and not the property itself. If the plaintiff, to suit his own convenience, got rid of the sale of the judgment-

1. (1913) 25 M.L.J. 104: L.R. 40 I.A. 56: I.L.R. 40 Cal. 598 (P.C.).
2. (1920) I.L.R. 45 Bom. 1094.

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debtor's right, title and interest in the property by paying the decretal amount into Court, he must equally be regarded as a volunteer. The learned Chief Justice observes:—

"If the true owner allows the attachment to continue, and the property to be sold as belonging to the judgment-debtor, he can treat the sale as a nullity and resist the auction purchaser. There is no necessity for him to get rid of the sale of what in his opinion does not exist. The attachment of the property itself is a different matter, that may seriously inconvenience him, but if he is the true owner the sale of a non existent interest in it does not affect him. If he pays in money to get that sale set aside it can only be treated as a voluntary payment."

The learned Judges however recognise that if the *property* was sold there might be a difficulty in distinguishing between a payment made under protest to get rid of an attachment and a payment made under protest to get a sale after attachment set aside, conceding, of course, that in the former case the payment would be involuntary according to the decision of the Privy Council in *Kanhaya Lal's case*[1].

With all due respect, I find it difficult to appreciate this reasoning. It is no doubt the right, title and interest of the judgment-debtor, if any, in the property that is brought to sale. But what is brought to sale is what has been attached (O. 21, r. 64), so that there is no distinction in this respect between an attachment and a sale. If, therefore, a Court sale of a property cannot affect the true owner's title thereto, neither can an attachment by Court affect it and payments to avert both must be equally voluntary. The fact is, however, that both attachment and sale purport to affect the *property* proceeded against, so far as the provisions of the Civil Procedure Code in that behalf are concerned (*see* Ss. 60, 65, O. 21, r. 54, r. 64, r. 66 and r. 94 and Forms Nos. 24, 27, 29 and 38 of Appendix E to Sch. I, Civil Procedure Code), and the familiar expression "right, title and interest of the judgment-debtor" does not occur in any of these provisions but (so far I have been able to trace its origin) was used by Sir James Colvile in the judgment of the Privy Council in pointing out the difference between a sale by private contract and a sheriff's sale under a *fi fa* in *Dorab Ally Khan* v. *Abdool Azeez*[2].

It seems to me therefore that if the attachment of property in execution of a decree obtained against a third party is a wrongful interference with the true owner's right and a

1. (1913) 25 M.L.J. 104: L.R. 40 I.A. 56: I.L.R. 40 Cal. 598 (P.C.).
2. (1878) L.R. 5 I.A. 116 at 125 and 127: I.L.R. 3 Cal. 806 (P.C.).

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payment to avert it must be regarded as involuntary, the same result must follow where the attached property is sold and payment is made to avert such sale.

Referring to the terms of O. 21, r. 89, the learned Chief Justice observes:

"But I think it was also intended that once the property had been sold the price paid by the purchasers should be available for the decree-holder, leaving it to the purchaser to make what he could out of his purchase, and that if the sale was set aside by payment into Court under r. 89, the money should go to the decree-holder in execution of whose decree the property was sold."........"If the Legislature had intended that sales could be set aside if payment was made into Court conditionally, then it would have said so."

It seems to me, however, that this can have no bearing upon the question whether the payment was involuntary and recoverable as such. It may be that the payment into Court should be unconditional for a sale to be set aside under O. 21, r. 89; but so has it to be for an attachment to be withdrawn under O. 21, r. 55. The truth is that the right to recover the money paid to raise an attachment or to set aside a sale does not depend upon any conditions annexed to such payments when made, but arises out of the compulsion of law involved in such cases. In this country, it is a "statutory right" under S. 72 of the Indian Contract Act—see *Kanhaya Lal* v. *National Bank of India, Ltd.*[1]

The learned Chief Justice then refers to the various remedies available under the Civil Procedure Code to the true owner whose property has been wrongfully attached and sold in execution and observes that if such owner, "to suit his own convenience," gets the sale set aside by depositing the required amount in Court under O. 21, r. 89 unconditionally there is no reason why such payment should not be considered to be voluntary. But this line of reasoning, one should have thought, was finally disposed of by their Lordships of the Privy Council in *Kanhaya Lal* v. *National Bank of India, Ltd.*[2], where they made these memorable observations:—

"A wrongful interference" (that is, by attachment) "with the plaintiff's lawful enjoyment of his own property is alleged. The plaintiff was clearly entitled to rid himself of that unlawful interference by any lawful means without thereby affecting his right to hold the defendants liable for that which they have thus caused him to do. By English law it is not open to the wrongdoer to prescribe by which of two lawful alternatives the injured man

1. (1923) 45 M.L.J. 497: L.R. 50 I.A. 162: I.L.R. 4 Lah. 284 (P. C.).
2. (1913) 25 M.L.J. 104: L.R. 40 I.A. 56: I.L.R. 40 Cal. 598 (P.C.).

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puts a stop to the wrong under which he is suffering. His choice of any one alternative does not make it as between him and the wrongdoer a voluntary act, or estop him from claiming that it was done under coercion."

I have dealt with this decision of the Bombay High Court at some length as it is the first of its kind, the later cases having mostly adopted its reasoning and followed it. It is however worthy of note that in *Shankerrao Keshavrao* v. *Vadhilal Mulchand*[1], another Bench of that Court while following the above case remarked:—

"If the matter were *res integra*, it must have been possible to hold that the plaintiffs are entitled to recover back the amount under S. 72 of the Indian Contract Act. The action of the plaintiffs would not be a voluntary payment of the debts of the other defendants Nos. 2 to 6 who were liable, but it was a payment made to save their property and get it back from the mortgagee-decree-holder who had wrongly allowed it to be sold in execution of the mortgage decree"

The decision of the Patna High Court in *Raghu Ram Pandey* v. *Deokali Pande*[2] followed *Narayan* v. *Amgauda*[3] and does not call for any additional comment. Turning now to Madras decisions on the point, there is the judgment of Venkatasubba Rao, J., sitting alone in *Kummakutty* v. *Neelakandan Nambudri*[4]. The learned Judge also followed the decisions in *Narayan* v. *Amgauda*[3] and *Raghu Ram Pandey* v. *Deokali Pande*[2] already referred to. Referring to O. 21, r. 89, he observed:—

"Its object is to put an end to every kind of contention and dispute. The judgment-debtor is saved from the threatened deprivation of his property; the decree-holder's claim is satisfied and the auction purchaser is compensated. The section would be frustrated if the person paying money under it is permitted to do so under protest. Cl. 2 of r. 89 enacts:—

'Where a person applies under r. 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.'

This shows that the proceedings referred to are utterly incompatible. If the debtor wants to keep a dispute open, he cannot claim the benefit of this section. In fact, this accords to him a special indulgence. While he is thus favoured, care is taken to provide that the interests neither of the decree-holder nor of the purchaser are sacrificed. It follows from this that, when the judgment-debtor pays the amount specified, he pays it unconditionally."

These observations are rather widely expressed and if they were intended to convey the meaning that once a judgment-debtor pays the amount to set aside the sale under O. 21, r. 89, he must be deemed to have made the payment voluntarily even

1. (1932) I.L.R. 57 Bom. 601. 2. (1927) I.L.R. 7 Pat. 30.
3. (1920) I.L.R. 45 Bom. 1094.
4. (1930) 59 M.L.J. 893: I.L.R. 53 Mad. 943.

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though he has preferred an appeal from the decree in question, and will be disentitled to a restitution of the amount if the decree is set aside on such appeal, I must respectfully dissent from them, but that this was not the learned Judge's meaning would seem to be clear from his later decision in *Pappu Reddiar* v. *Pichu Aiyar*[1]. That was a case where a decree-holder after obtaining satisfaction of his decree which was not however certified to the Court, executed it again and brought certain properties as belonging to the judgment-debtor to sale. A transferee from the judgment-debtor applied under O. 21, r. 89 to set aside the sale making the statutory deposit and afterwards brought a suit to recover from the decree-holder the amount paid to him. The learned Judge sitting with Abdur Rahman, J., held that:—

"A person making a payment to rid himself of unlawful interference with his property can recover the money back and this principle is applicable to a payment under O. 21, r. 89, Civil Procedure Code. The right in such a case does not rest upon justice and equity founded on the English analogy but is a statutory right expressed in terms of S. 72 of the Contract Act." (Head note).

Dealing with the decision in *Kummakutty* v. *Neelakandan Nambudri*[2], he observed:—

"In the former case, it has been held that O. 21, r. 89 is inconsistent with the notion that payment can be made either under protest or coupled with conditions. True, but the whole judgment proceeds upon the footing, first that there was a subsisting decree, that is, subsisting in fact and secondly, there was a decree-holder, one who really answered that description ...... O. 21, r. 89 assumes the existence of the decree and of a decree-holder, and where the very foundation is gone, namely, a subsisting decree, it would be futile to contend that the decisions which refer to unconditional payment can apply."

These observations clearly show that the learned Judge never intended his decision in *Kummakutty* v. *Neelakandan Nambudri*[2] to be understood as barring the claim of a judgment-debtor to restitution after the decree is varied or reversed in appeal or the similar claim of a person in the position of the first respondent here who gets a decree purporting to affect his property, set aside in a regular suit brought for the purpose. For, in either case it can be said with equal justification that there was no "subsisting decree" nor any one really answering to the description of a decree-holder.

The learned Counsel for the appellant then referred me to the decision of a Full Bench of this Court in *Krishna Aiyar* v.

1. (1938) 1 M.L.J. 829.
2. (1930) 59 M.L.J. 893: I.L.R. 53 Mad. 943.

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Arunachalam Chettiar[1], where the observations contained in *Narayan* v. *Amgauda*[2], *Kummakutty* v. *Neelakandan Nambudri*[3] and *Raghu Ram Pandey* v. *Deokali Pande*[4], to the effect that a deposit under O. 21, r. 89 must be unconditional were applied to a case to whose facts, if I may say so, they were properly applicable. A mortgagee from a judgment-debtor claimed and established that he had priority over the rights of a decree-holder auction purchaser of the property and applied for the return of the amount which he had deposited under O. 21, r. 89 for getting rid of the sale. The amount was still in Court and was also claimed by the decree-holder whose purchase had been set aside, and the question arose as to who was entitled to the payment of the deposit. The Full Bench held that an applicant under O. 21, r. 89 could not attach any condition to the deposit required to be made under that provision, nor could the Court accept such deposit subject to any condition. In this view the learned Judges directed the deposit to be paid out to the decree-holder, as it had been expressly put into Court for that purpose. It will be observed that the Full Bench was not concerned with a suit to recover money paid under coercion or a claim by way of restitution as to which, as I have already indicated, different considerations will arise. There may be observations here and there which may perhaps appear to have a bearing on the question whether a payment made for purposes of O. 21, r. 89 should be regarded as voluntary or involuntary, but they must be regarded as *obiter* and not as concluding the question before me.

The learned Counsel for the respondents has relied upon the decisions of the Privy Council in *Fatima Khatoon Chowdrain* v. *Mahomed Jan Chowdry*[5], *Dulichand* v. *Ramkishen Singh*[6], *Kanhaya Lal* v. *National Bank of India, Ltd.*[7] and *Kanhaya Lal* v. *National Bank of India, Ltd.*[8] and on *Kotlu Satyam* v. *Thammanna Perraju*[9] decided by a Division Bench of this Court. These decisions clearly establish that a payment made by a person interested in the property to have the property released from a

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1. (1935) 69 M.L.J. 349: I.L.R. 58 Mad 972 (F.B.).
2. (1920) I.L.R. 45 Bom. 1094.
3. (1930) 59 M.L.J. 893: I L.R. 53 Mad. 943.
4. (1927) I.L.R. 7 Pat. 30.
5. (1868) 12 M.I.A. 65.
6. (1881) L.R. 8 I.A. 93: I.L.R. 7 Cal. 648 (P.C.).
7. (1913) 25 M.L.J. 104: L.R. 40 I.A. 56: I.L.R. 40 Cal. 598 (P.C.).
8. (1923) 45 M.L.J. 497: L.R. 50 I.A. 162: I.L.R. 4 Lah. 284 (P.C.).
9. (1931) 34 L.W. 399.

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wrongful attachment or to stave off a wrongful sale of the property must be regarded as an involuntary payment and can be recovered by the person making the payment. As I have already observed, the entire circumstances of the present case unmistakably point to the payment in question having been made by the first respondent under force of execution of the decree in O. S. No. 912 of 1926 which has since been set aside at his instance. Indeed, the learned Counsel for the appellant did not seriously contend that apart from O. 21, r. 89, the payment could be deemed to be voluntary on the facts of this case. He took his stand solely upon the provisions of O. 21, r. 89 as establishing the voluntary character of the payment. In other words the argument was however involuntary in fact and in truth a payment may be found to be as disclosed either by the express terms or by the circumstances in which it is made, if it is made for the purposes of O. 21, r. 89, the latter provision imports a species of estoppel which prevents the person making the payment from recovering it as one made under coercion. As I said before, this contention is somewhat startling, though some of the decisions already referred to seem to lend some support to it, but I do not regard them as binding precedents.

And it is worthy of note that none of these decisions goes the length of holding that if a judgment-debtor or any other person bound by a decree makes a deposit under O. 21, r. 89 to have a sale of his property held in execution set aside, his claim for restitution made either under S. 144, Civil Procedure Code or under the general law, after the decree has been reversed in appeal or set aside in a suit brought for the purpose, is unsustainable. The first respondent's claim in this case is also essentially one for restitution and I can see nothing in reason or in law to bar his claim.

The appeal therefore fails and is dismissed with costs.

Leave granted.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT.

Sri Sri Narasimha Pattamahadevi *alias* Padmavathi Pattamahadevi Garu .. *Petitioner* (Respondent-Respondent)*

v.

Seemala Annan Naidu and others.. *Respondents (Petitioners-Appellants).*

Narasimha Pattamahadevi *v.* Annan Naidu.

Civil Procedure Code (V of 1908), O. 21, r. 90 (proviso)—Power to call upon applicant to furnish security—When to be exercised.

The word "Admission" conveys that point of time when an application or suit as the case may be is received into Court and accepted for decision and that stage is when notice is given to the opposite side.

The Court is responsible for executing its decrees and the framers of the proviso had in mind the discretion in the Court to pass such orders as it thinks fit for the protection of the decree-holder but the wording of the proviso specifically excluded the right of a decree-holder to apply to the Court for such orders. The power of the Court to call upon the applicant to furnish security is confined to the time anterior to admitting the application to set aside the sale.

Brij Behari Lal v. *Firm Srinivas,* (1939) I. L. R. 18 Pat. 327: A.I.R. 1939 Pat. 248 (F.B.), referred to.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Chicacole, dated 27—11—1937 and made in C. M. A. No. 25 of 1937 preferred against the order of the Court of the District Munsif of Parvatipur dated 2nd July, 1937 in E. A. No. 298 of 1937 in E.P. No. 281 of 1936 in O. S. No. 286 of 1934.

P. Somasundaram for Petitioner.

V. Govindarajachari for Respondents.

The Court delivered the following

JUDGMENT.—In execution of a decree a sale was ordered on the 15th of March, 1937. On the 10th of April, 1937, the judgment-debtor petitioned the Court to set aside the sale under O. 21, r. 90. Notice went to the decree-holder and on the 1st of May, 1937, he put in a counter-affidavit in which he prayed that the judgment-debtor should deposit security. On the same day the Court ordered the judgment-debtor to deposit security by the 15th of June, 1937. On the 14th of June, 1937, he put in a petition to the Court saying that the Court had no power to order the deposit because the order to furnish security was

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*C. R. P. No. 246 of 1938. 20th October, 1939.

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made after the petition to set aside the sale was admitted. On the 28th of June, 1937, that petition was dismissed. Time was extended to 2nd July, 1937. On that day the judgment-debtor stated he was unable to make the necessary deposit and his petition was dismissed. He appealed and the learned Subordinate Judge of Chicacole decided in his favour that the Court should not order a deposit after a petition was admitted.

The order of the District Munsif was as follows:—

"It has been argued before me that the order directing the deposit should be made before admitting the application (E. A. No. 298 of 1937) under the amendment to r. 90 of O. 21. It is no doubt true that such an order can be passed even before admitting the petition on file but there is no restriction anywhere that no such order can be passed at no other time."

The learned Subordinate Judge passed the following order reversing the order of the District Munsif:

"The lower Court has obviously misapplied the first proviso to O. 21, r. 90. Security or deposit must have been 'called for' and that 'before' the admission of the application to justify the dismissal of the petition. The order of the lower Court is accordingly set aside. . . . ."

It is argued before me now by the Counsel on behalf of the decree-holder that the order of the Subordinate Judge is wrong and that of the District Munsif right.

O. 21, r. 90 provides for applications to set aside sales on the ground of irregularity. On the 20th of October, 1936, it was amended by introducing the following proviso:

"Provided that the Court may, before admitting the application, call upon the applicant either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or that realised by the sale, whichever is less or to deposit such amount into Court."

The question before me is whether the power of the Court to call upon the applicant to furnish security is confined to a time anterior to admitting the application to set aside or whether, as argued by the petitioner before me, it can be done not only before but after. No authority has been cited to me dealing directly with the question. I was referred to the decision of a Full Bench of five Judges of the High Court of Patna, *Brij Behari Lal* v. *Firm Srinivas*[1], which is in relation to O. 21, r. 90 as it is in Patna. In the course of that decision Harris, C. J., dealing with the term "admission", says that:

"Admission of the application presumably means the stage when the Court decides to issue notice upon such application to the opposite parties concerned."

1. (1939) I.L.R. 18 Pat. 327: A.I.R. 1939 Pat. 248 (F.B.).

Narasimha Pattamahadevi v. Annan Naidu.

I respectfully agree. "Admission" to my mind conveys that point of time when an application or suit, as the case may be, is received into Court and accepted for decision, and that stage is when notice is given to the opposite side. A common example of that is the process known as admitting a Civil Revision Petition or a Second Appeal. I have before me the original petition placed before the District Munsif and it will be seen that he issued notice on the 20th of April, 1937 and proceeded to hear the application on the 1st of May, with affidavits completed, which obviously must be a stage long after admission. I think this proviso means exactly what it says. The Court, after all, is responsible for executing its decrees and I think the framers of the proviso had in mind the discretion in the Court to pass such orders as it thinks fit for the protection of the decree-holder, but the wording of the proviso specifically excludes the right of a decree-holder to apply to the Court for such orders. Whether this is satisfactory or whether it might not be usefully provided that an opportunity might be given to the decree-holder to be heard may possibly be matters for consideration: but as framed at the present moment, the wording seems to me to admit of no doubt whatever. The lower appellate Court therefore decided this matter rightly and this petition must be dismissed with costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Ramanatha Gurukkal *alias* Parameswara Gurukkal .. *Appellant** (*Appellant*)

v.

V. V. R. Arunachalam Chettiar, Manager for the time being of Tirupalathurai Siva Devasthanam and another .. *Respondents* (*Respondents*).

Ramanatha Gurukkal v. Arunachalam Chettiar.

Madras Hindu Religious Endowments Act (II of 1927), S. 43—If ousts the jurisdiction of Civil Courts to entertain a suit by a dismissed archaka *challenging the correctness of the trustee's action.*

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* L. P. A. No. 75 of 1938. 22nd November, 1939.

Ramanatha Gurukkal *v.* Arunachalam Chettiar.

In a suit by a hereditary *archaka* challenging the correctness of the action of the trustees in dismissing him, ostensibly on the ground of his suffering from leucoderma but really owing to ill will on the part of the trustees,

Held, that S. 43 of the Madras Hindu Religious Endowments Act (II of 1927) precludes the plaintiff from challenging the trustee's action in a Court of law. His remedy is to appeal to the Temple Committee.

(1938) 2 M.L.J. 516, (decision of *Wadsworth, J.*), affirmed.

Appeal under cl. 15 of the Letters Patent against the judgment[1] of the Hon'ble Mr. Justice Wadsworth in S. A. No. 381 of 1934, preferred against the decree of the Court of the Subordinate Judge of Trichinopoly in A. S. No. 24 of 1933 (O. S. No. 240 of 1928, District Munsif's Court, Kulitalai).

T. V. Muthukrishna Aiyar for Appellant.

M. Subbaraya Aiyar for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal raises the question whether an *archaka* of a temple who has been dismissed from his office by the trustee has a right to challenge the correctness of the trustee's action in a Court of law or whether his remedy is limited by S. 43 of the Madras Hindu Religious Endowments Act, 1926, to an appeal to the Temple Committee or to the Religious Endowments Board as the case may be.

The appellant is admittedly a hereditary *archaka* of the Thirupalathurai temple in the Trichinopoly District. He is suffering from leucoderma and he was dismissed from his office by the trustee, ostensibly on this ground, but it would appear from the findings of both the lower Courts that the trustee was actuated by ill will towards the appellant. S. 43 (1) of the Act states:

"All office-holders and servants attached to a temple or in receipt of any emolument or perquisite from the temple shall be under the orders and control of the trustee; and the trustee may fine, suspend, remove or dismiss any of them for breach of trust, incapacity, disobedience of lawful orders, neglect of duty, misconduct or other sufficient cause."

By sub-S. (2), an office-holder or servant of a temple other than an excepted temple may appeal to the Committee whose decision shall, in the case of a non-hereditary office-holder or servant, be final. By sub-S. (3), a hereditary office-holder or servant of a temple other than an excepted temple may prefer an appeal to the Board against the order of the Committee on appeal under sub-S. (2) and the decision of the Board shall be final. The temple of which the appellant was an archaka is a

1. (1938) 2 M.L.J. 516.

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non-excepted temple, but the appellant did not then appeal to the Committee against his dismissal by the trustee, but instituted a suit in the Court of the District Munsif, Kulitalai, for an injunction restraining the trustee from interfering with the appellant's exercise of his office. The District Munsif held that the suit could be maintained and granted an injunction restraining the trustee from interfering with the discharge of the duties of his office. An appeal was filed in the Court of the Subordinate Judge of Trichinopoly, who held that the appellant had no right of suit, and this decision was accepted by Wadsworth, J., on second appeal.

The right of the subject to appeal to the Court to redress a simple wrong can only be taken away by statute. As Varadachariar, J., observed in *Kamaraja Pandiya Naicker* v. *The Secretary of State for India in Council*[1], the ordinary rule is where a person's liberty or property is interfered with under colour of statutory powers, he has a cause of action which the Civil Courts are bound to entertain, unless a bar to such entertainment has been enacted expressly or at least by necessary implication. It is said on behalf of the trustee that the right of the appellant to have recourse to the Court is taken away by S. 43. It is also said that S. 73 operates as a bar to the suit.

It is not necessary to consider the arguments which have been based on the wording of S. 73, because we accept the argument of the respondent that S. 43 must be read as taking away the right of the appellant to file a suit. If S. 43 stood alone, there would be much to be said for the appellant's argument that his right to sue had not been taken away. It might be said that the word 'final' in S. 43 was only to be read as meaning final so far as an appeal under the Act was concerned and not as intended to shut out the jurisdiction of the Court as was said in *Valli Ammal* v. *The Corporation of Madras*[2], a case which arose under the Madras City Municipal Act of 1904. But S. 43 does not stand alone, and when the scheme of the Act and the provisions of Ss. 53 and 54 are considered, no reasonable doubt can exist that the Legislature has used language which is intended to have the effect of ousting the jurisdiction of the Courts. The scheme of the Act is to put under the control and management of the Board matters relating to temples

1. (1934) 69 M.L.J. 695
2. (1912) 23 M.L.J. 531 : I.L.R. 38 Mad. 41.

in this province. S. 53 gives the Temple Committee, which is under the control of the Board, power to suspend, remove or dismiss the trustee of a temple. A trustee against whom action has been taken under this section may appeal to the Board, but a hereditary trustee may, in lieu of appealing to the Board, apply to the Court to modify or cancel the order of the Committee. The order of the Committee shall when there has been no appeal to the Board be final, and when an appeal is preferred or an application is made to the Court the order of the Board or of the Court shall be final. S. 54 states:—

"(1) A non-hereditary trustee shall cease to hold his office, if he, (a) is sentenced by a Court to such punishment as is described in sub-S. (2) of S. 26 and subject to the proviso contained therein; (b) applies to be adjudicated or is adjudicated an insolvent; or (c) ceases to profess the Hindu religion.

(2) A hereditary trustee shall cease to hold his office if he ceases to profess the Hindu religion.

(3) If a hereditary trustee becomes subject to any of the disqualifications described in cl. (a) or cl. (b) of sub-S. (1), the Committee may supersede him and appoint a fit person to administer the temple until the disability of the trustee ceases to exist or another trustee succeeds to the office.

(4) The Board shall, in cases of dispute or doubt, determine whether a trustee is disqualified under this section and its decision shall be final."

There can be no doubt that in a case falling under S. 53 or S. 54 the decision of the Board ousts the jurisdiction of the Court, and unless there is something in S. 43 which compels us to place a different meaning on the word "final" used in that section from the meaning attaching to it in Ss. 53 and 54, we must hold that it is intended to be final to the extent even of excluding the right of an office-holder or servant to challenge the decision in a Court of law. There is nothing in the wording of S. 43 which gives any indication that the word "final" is used in a different sense to what it is used in Ss. 53 and 54. The Court will naturally be adverse to closing its doors to a litigant who seeks a hearing but where the Legislature has used language which clearly indicates its intention to take away the right of recourse to Court, effect must be given to the intention.

For the reasons indicated we consider that S. 43 of the Act does preclude the appellant from challenging the trustee's action in a Court of law. His remedy is in an appeal to the Committee and we understand that such an appeal has since been filed.

The present appeal must be dismissed with costs.

K. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

V. G. Manicka Mudaliar .. *Appellant** (*Defendant*)

v.

Andalammal .. *Respondent* (*Plaintiff*).

Manicka Mudaliar v Andal-ammal.

Madras High Court Original Side Rules, O. 23—Official Referee—Powers—English practice—How far applicable.

Questions as to substantive rights are solely within the province of a Judge and matters of detail that is, the working out of those rights either by taking accounts or effecting a partition or selling properties are under the rules, functions which the Judge may delegate to the Official Referee. Where the questions raised in the issues are entirely within the province of the Judge the Court has no jurisdiction to refer them to any one for decision unless the parties had agreed to submit their disputes to arbitration. The rules of practice in English Courts do not apply *en bloc* to the original side except so far as our own rules modify them.

Appeal against the judgment of the Hon'ble Mr. Justice Venkataramana Rao dated 25th July, 1938 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 562 of 1930.

W. S. Krishnaswami Naidu for Appellant.

A. Seshachariar for Respondent.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—This appeal arises out of a suit filed by the respondent on the Original Side of this Court for a declaration that a piece of land conveyed to the appellant under a deed dated the 30th October, 1925, is her property and that she is also entitled to the house built thereon. The respondent's case is that she acquired the site and built the house out of the proceeds of a milk business belonging to her. The appellant claimed that the milk business belonged to him and that the property was his. The suit was tried by Venkataramana Rao, J., who held that the property belonged to both of them in equal shares. Consequently, the learned Judge granted a decree for partition and the delivery to the respondent of her half share with mesne profits. The respondent has not appealed, and the main question which the Court is called upon to consider is whether the appellant is entitled to the share allotted to the respondent; in other words whether he is absolute owner of the site and the house. The procedure which was adopted in this case was not in accordance with that contemplated by the Code of Civil

*O. S. Appeal No. 64 of 1938. 24th January, 1940.

Procedure, and it is necessary also to consider the effect of this. It will be convenient to deal first with the question relating to the procedure adopted.

The plaint was filed on the 18th November, 1930. The hearing was interrupted after a portion of the plaintiff's evidence had been recorded by Lakshmana Rao, J., and on the 1st October, 1935, the following order was passed by the learned Judge with the consent of the parties:—

1. "That this suit be and is hereby referred to the Official Referee of this Court for the determination of the following issues, namely:—

(i) Did the plaintiff carry on milk business or any other business of her own and was the defendant entrusted with the management of all or any of the said business as her agent? If so, is the defendant liable to render an account?

(ii) Was the said house No. 14, Pallappan Street, Triplicane, Madras, purchased and constructed out of funds belonging to the plaintiff in the name of the defendant benami for the plaintiff? If so, is the defendant liable to account to the plaintiff for the mesne profits?

(iii) Is the defendant in possession of all the movable properties mentioned in the Sch. 'B' to the plaint and do any of them belong to the plaintiff?

2. That the said Official Referee do give his findings on the said issues and submit his report and proceedings thereon to this Court expeditiously.

3. That the evidence recorded herein so far, shall be treated as evidence before the said Official Referee and the said Official Referee do continue the enquiry from the stage at which it was stopped.

4. And that the further consideration of this suit do stand adjourned until after the receipt of the report of the said Official Referee by this Court."

In accordance with this order the Official Referee recorded the further evidence tendered by the parties and the depositions and exhibits comprise a volume of nearly 200 printed pages. The Official Referee presented his report to the Court on 2nd September, 1937, and it was considered by Venkataramana Rao, J., on 12th May, 1938. I should mention that shortly after the consent order of 1st October, 1935, had been passed the respondent applied to Lakshmana Rao, J., to recall the order on the ground that the Official Referee had no jurisdiction to conduct the inquiry into the questions set out therein and that it had been passed without the position being fully realised. The learned Judge, however, refused to recall the order and stated his reasons in these words:

"The suit was referred to the Official Referee by consent and it is this Court that goes finally into all the questions and decides the right of the parties. There is therefore no need to or ground for review and the application is dismissed with costs."

The question relating to the procedure adopted was raised before Venkataramana Rao, J., who considered that it was

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unlawful and expressed the opinion that Lakshmana Rao, J., should have recalled the order of reference. Inasmuch as the suit was of long standing and the parties had agreed that the evidence recorded by the Official Referee should be treated as evidence in the trial, the learned Judge decided not to put the case back for trial *de novo* and gave his judgment on the evidence recorded by the Official Referee, but he did not ignore the Official Referee's report altogether.

There can be no doubt that the procedure adopted in this case was not only irregular, but was opposed to the provisions of the Code of Civil Procedure and had no sanction from the rules of practice of the Original Side of this Court. I entirely agree with the observation of Venkataramana Rao, J., that Lakshmana Rao, J., should have recalled the order of reference when the application was made to him by the respondent. As a matter of fact he ought to have refused to pass the consent order. The questions raised in the issues were entirely within the province of the Judge, and, as Venkataramana Rao, J., has said, the Court had no jurisdiction to refer them to any one for decision unless the parties had agreed to submit their disputes to arbitration. This very question was raised before Kumaraswami Sastri, J., in C. S. No. 661 of 1920 and, with Venkataramana Rao, J., I am in agreement with the following observations which Kumaraswami Sastri, J., made in that case:—

"He (the Official Referee) is not a Judge of the Court but only a Commissioner and I think that the adjudication by him of these questions, which under the Code and the rules, form part of the functions of a Judge would be *ultra vires*. The Judge referring to the Official Referee questions which have to be tried by himself could not confer jurisdiction on the Official Referee any more than he can confer jurisdiction on a stranger by asking him to decide points in dispute in the case. Questions as to the substantive rights are solely within the province of a Judge and matters of detail, that is, the working out of those rights either by taking accounts or effecting a partition or selling properties are, under the rules, functions which the Judge may delegate to the Official Referee . . . . It will be a novel and, in my opinion, a dangerous proposition to hold that the Rules of Practice in English Courts apply *en bloc* to the original side except so far as our own rules modify them."

In a suit of the description of the one now under consideration the Court has no power to adopt the rules of practice in England. O. 26 of the Code of Civil Procedure states when commissions may be issued. They may be issued for the examination of witnesses, for the purpose of local investigations, for the purpose of examination of accounts and for the

effecting of partition, but for no other purposes. O. 23 of the rules of the Original Side states the procedure which should be followed when there is a reference, but they do not purport to enlarge the powers of the Official Referee or authorise the issue of commissions beyond those mentioned in the Code of Civil Procedure.

Counsel are agreed, as they were agreed before Venkataramana Rao, J., that the Court shall treat the evidence recorded by the Official Referee as being evidence recorded by the Court and they are content that the rights of the parties shall be decided on what appears in the printed record, but they suggest that the report of the Official Referee should be eliminated. It seems to me that it is open to the Court in the circumstances of this case to adopt this course. I consider that the Court should ignore the report of the Official Referee, and I may say that neither I nor my learned brother has read it. Approval for the suggested course may be obtained from the decision of the Privy Council in *Sri Thakur Ramkrishna Muraji* v. *Ratan Chand*[1]. In that case an ancestral business of a Mitakshara joint family had been carried on in partnership with another person. The stranger partner retired and thereupon the partnership was dissolved and wound up. The business was then carried on in the same commodities and in the same premises though under a new firm name and with new books. It was alleged that speculative transactions were subsequently entered into and it was contended that the business could not be regarded as a family affair. When the case was before the High Court on appeal a commissioner was appointed to examine the books and report whether the new business was of a gambling nature. The Privy Council disapproved of this course as this question was one for determination by the Judge alone. As their Lordships were not aware whether the order referring to the Commissioner was made under protest by the appellant-defendant or with his consent, they were not prepared to hold that the report of the Commissioner should be disregarded, and in fact took it into consideration along with the other evidence in the case. In the case before us the consent of the respondent to the matter proceeding before the Official Referee was withdrawn and it is for that reason that I consider that the

1. (1931) 61 M.L.J. 665: L.R. 58 I.A. 173: I.L.R. 53 All. 190 (P. C.).

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report of the Official Referee should not be considered. As the parties have expressly agreed before us that the evidence recorded by the Official Referee shall be treated as evidence in the case there can be no objection to the Court taking that evidence into consideration, but at the same time I trust that in future similar references will not be made to the Official Referee.

Turning now to the facts, the respondent is the wife of one Balasundara Mudaliar whom she married in 1898. In 1919 the appellant married the daughter of the respondent's brother. He had been married before, but his first wife had died. At the time of the appellant's marriage the respondent and her husband were living in her brother's house with her brother and his family. In 1920 the appellant became ill and he went to live in his father-in-law's house. That year his wife and his daughter by his first wife were accidentally drowned. The appellant continued to live in the respondent's brother's house and it is now common ground that improper relations developed between the appellant and the respondent. This was persisted in and resulted in the respondent's husband leaving the house in 1921, since when he has never returned to live with the respondent. The illicit intercourse between the appellant and the respondent continued and eventually they lived openly as man and wife. The site of the house was bought in 1925 and the house was built during the years 1927 and 1928. When it was completed the appellant and the respondent left the respondent's brother's house and went to live in the new house and continued to do so until 1930 when they quarrelled. The appellant says that he provided the whole of the money for the purchase of the land and for the building of the house, but it appears to me to be abundantly clear that he had not sufficient resources of his own to meet anything like the cost of this property. The site was bought for Rs. 1,989-5-4 and over Rs. 10,000 was spent on the building of the house. The appellant was a police constable and never in his service drew more than Rs. 38 a month. He retired from the police force in 1924 on a pension of Rs. 11 a month. The evidence discloses that the respondent had means. It is admitted that when the appellant went to live in her brother's house she had two businesses, one in dhall and the other in lungis, and it has been proved that she was carrying on a milk business as long ago as 1911. The lungi business was closed in 1922, because

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of the fall in price of piece goods and the dhall business was closed in 1924. The reason given for the closing of the dhall business was that the milk business in which the appellant was assisting had so grown and was so profitable that there was no time for the dhall business. The evidence also discloses that the respondent was in the habit of lending money and that she had a post office savings bank account.

I agree with the learned trial Judge that the fact that the land was bought in the name of the appellant is not of very great importance. When it was bought the appellant and the respondent were living openly as man and wife and this no doubt accounts for the fact that the land was taken in the name of the appellant. It is also true that some of the money for the building of the house was borrowed in the appellant's name. It would be far easier for a man, than a woman, to borrow money and as they were living together and were going to live in the new house it was only natural that the appellant should borrow money in his own name. I concur in the finding of the learned trial Judge that the milk business belonged to the respondent and that the house was really bought from the profits of this business.

The learned Judge awarded the appellant a half share in the property because he considered that it was

> "Unlikely that the appellant would have retired from service but for some understanding between them that the business should be shared equally between them and that whatever was earned by either must be shared by either."

In these circumstances the learned Judge considered that there was an agreement of partnership subsisting between them. As I have indicated, this finding has not been challenged. It has been stated at the Bar that the respondent had not the means to pay the court-fee necessary for a cross-appeal. That is a question which the Court cannot go into now. There was no application for leave to appeal *in forma pauperis* and the Court can only assume that the respondent acquiesced in this part of the judgment of Venkataramana Rao, J. On the evidence the appellant can clearly not maintain a claim for more than what has been awarded to him. The learned Judge has discussed the evidence in detail and I consider that the reasons which he has given for finding in favour of the respondent to the extent of a half share in the property cannot be seriously challenged. Whether the respondent might have succeeded if a cross-appeal

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had been filed is a question which does not in the circumstances require to be considered.

For the reasons indicated I would dismiss the appeal with costs.

Krishna-swami Aiyangar, J.

Krishnaswami Aiyangar, J.—I am in entire agreement with the judgment just pronounced by my Lord. I shall, however, add a few words on the question as to what matters are properly referable for inquiry to the Official Referee. Before the creation of the office of the Official Referee some 25 or 30 years back, the practice on the Original Side was to entrust inquiries into accounts and such other matters as are referable to a Commissioner under O. 26 of the Code of Civil Procedure, to a Commissioner appointed *ad hoc* by the Court. There were delays in the submission of reports and defects noticed in them which necessitated fresh references. For these and other reasons, it was felt it would be a great advantage to have a permanent officer with the necessary training and experience to enable him to do in a more satisfactory way what was till then being done by a Commissioner. To start with, it was certainly not the idea to delegate to the Official Referee any of the functions of the Court. Neither is there anything in the Rules of the Original Side to warrant the view that there has since been an enlargement in the scope of the functions of the Official Referee. He is to be no more than a permanent Commissioner for the purpose of taking the accounts and making the inquiries contemplated by the Code of Civil Procedure. O. 23 of the Rules of the Original Side contain the provisions relating to the appointment of a Commissioner, and a definition of the matters which could be left to him for enquiry and report. There is nothing in O. 24 of the Original Side Rules to suggest that it was the intention to give him an extended jurisdiction. R. (1) of this order says that

> "Subject to the Rules hereinafter contained, O. 23 of the rules relating to accounts and enquiries referred to a Commissioner shall, as far as practicable, apply to all proceedings before the Official Referee."

This is a fair indication that the Official Referee is only expected to perform the functions of a Commissioner under the Code and that it was never intended that he should have power to deal with or decide material questions of fact or law on which the decision of the suit itself depends. So far as my knowledge goes questions of this character were rarely if ever referred to

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the Official Referee for decision or report. Such a course might have been taken in a few exceptional instances but I think that it happened almost always because both sides consented to it and invited the presiding Judge to adopt this procedure. In such cases the inquiry generally went on without demur and the report when made was taken into consideration by the Court. I am not aware that there has been any instance of a reference being made on substantial questions in contest between the parties, without their express consent, or the Referee's report considered valid in spite of objection taken to his jurisdiction to try. I may also observe that whenever during an inquiry before the Official Referee material questions of fact or law arose it has been the practice ordinarily for the Referee to refer those questions to the Court or ask the parties to take the orders of the Court thereon. Questions of title to property and such other material questions were as a rule dealt with by the Court.

I agree that in view of the fact that in the present case the consent had been withdrawn even before the commencement of the inquiry before the Official Referee there is good reason for ignoring the findings of the Referee altogether, though there can be no objection to the evidence recorded by the Official Referee being treated as evidence in the case with the consent of the parties. It is on this footing that we have considered the appeal, learned Counsel on both sides having expressly assented to this course.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Reddi Krishnan Naidu and others .. *Appellants* (Respondents)*

v.

Chintala Somi Naidu and others .. *Respondents (Appellants and Respondents 5 and 6).*

Krishnan Naidu v Somi Naidu.

Suit on pronote executed by Hindu father—Sons who were made parties dismissed from suit—Sons if exonerated from liability under Hindu Law in respect of the decree.

* L. P. A. Nos. 97 and 98 of 1938. 12th December, 1939.

Krishnan Naidu v. Somi Naidu.

In a suit on a promissory note executed by the father alone the sons were made parties and in the first appellate Court a decree was passed against the father alone and the sons were dismissed from the suit. In execution proceedings the decree-holder asked for the attachment and sale of the sons' interests in the family property. The sons objected on the ground that as they had been dismissed from the suit they could not be held liable for their father's debts.

Held, after examining the case-law, the dismissal of the suit as against the sons did not prevent the decree-holder executing the decree against the sons' interests in the family property.

Periasami Mudaliar v. *Seetharama Chettiar*, (1903) 14 M L.J. 84: I L.R. 27 Mad. 243 (F.B), followed.

Raja Ram v. *Raja Bakhsh Singh*, (1938) 1 M.L J. 41: I L.R. 13 Luck. 61 (P.C.), distinguished.

Decision of King, J., reversed.

Appeal under cl. 15 of the Letters Patent from the judgment of the Hon'ble Mr. Justice King, dated 28th October, 1938, and passed in A.A.A. O. No. 39 of 1936, preferred against the order of the Court of the Subordinate Judge of Vizagapatam dated 21st August, 1935 and made in A. S. No. 181 of 1935 (A. S. No. 283 of 1935, District Court, Vizagapatam), preferred against the order of the Court of the District Munsif of Parvatipur dated 3rd September, 1934 and made in E. A. No. 611 of 1934 in E. P. No. 754 of 1933 in O. S. No. 52 of 1931, etc.

V. Govindarajachari for Appellants.

Y. Suryanarayana for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—These two appeals arise out of the same suit and they can be disposed of here in one judgment. The appellants obtained a money decree against the third respondent in the Court of the District Munsif of Parvatipur. The appellants made the third respondent's sons parties to the suit and they are respondents 1, 2 and 4. The suit was on a promissory note executed by the father alone. The sons were joined as defendants on the ground that the debt was incurred for family necessities. The District Munsif dismissed the suit, as he was not satisfied that the promissory note was genuine, but on appeal to the District Judge a decree was passed against the father. In the District Court the appellants decided not to ask for a decree against the sons who were dismissed from the suit. In due course the appellants instituted execution proceedings and asked for the attachment and sale of the sons' interests in the

family property. The sons objected on the ground that as they had been dismissed from the suit they could not be held liable for their father's debt. The District Munsif upheld their objection, but on appeal the Subordinate Judge held that they could be held liable in execution proceedings. The sons then appealed to this Court. The appeal was heard by King, J., who allowed it, but granted leave to appeal under cl. 15 of the Letters Patent.

The Subordinate Judge found that there was no intention on the part of the appellants in allowing the sons to be dismissed from the suit to exonerate them altogether. King, J., reversed the Subordinate Judge's decision because he considered that the authorities which support the Subordinate Judge's decision had in effect been overruled by the decision of the Privy Council in *Raja Ram* v. *Raja Bakhsh Singh*[1]. The appellants contend that the learned Judge has misconceived the effect of this decision. They say that it has not in any way altered the law as stated in the decisions of this Court.

It is not necessary to examine all the judgments of this Court which have a bearing on the question; it is sufficient to refer to the Full Bench decision in *Periasami Mudaliar* v. *Seetharama Chettiar*[2] and to *Periaswami* v. *Vaidhilingam Pillai*[3] and *Doraiswami* v. *Nagasami*[4], which were decided by Division Benches. In *Periasami Mudaliar* v. *Seetharama Chettiar*[2], Benson, Bhashyam Aiyangar and Russell, JJ., held that, independently of the debt arising from the original transaction entered into by a father a decree passed against him in respect of the transaction by its own force creates a debt as against him which his sons are under the Hindu law under an obligation to discharge, unless they can show that the debt is illegal or immoral. Bhashyam Aiyangar, J., said:

> "But I can see no reason why a suit could not be brought against the son to recover a debt of record due by the father, which debt the father was under an obligation to discharge, quite independently of the cause of action or the alleged original debt on which the suit had been brought against him .... The whole of the joint family property in the hands of the son must be held liable to satisfy the debt imposed upon the father by the judgment, as a solemn debt of record, quite independently of the original cause of action or alleged debt on which the suit against the father had been brought."

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1. (1938) 1 M.L.J. 41 : I.L.R. 13 Luck. 61 (P.C.).
2. (1903) 14 M.L.J. 84 : I.L.R. 27 Mad. 243 (F.B.).
3. (1937) 47 L.W. 60.
4. A.I.R. 1929 Mad. 898.

Krishnan Naidu v. Somi Naidu.

Leach, C.J.

In *Periaswami* v. *Vaidhilingam Pillai*[1], Varadachariar and Pandrang Row, JJ., considered a case in which the suit was filed against the father and his sons, but before judgment was passed the suit was withdrawn as against the sons. The question was whether the sons were liable inasmuch as the debt was a debt binding upon them under the rule of Hindu Law. The learned Judges held that the withdrawal of the suit as against the sons did not exonerate them. The result of the withdrawal was not to bring into operation the rule of *res judicata* embodied in S. 11 of the Code of Civil Procedure, but only to entail the statutory penalty enacted in O. 23, r. 1, which was that no fresh suit could be instituted against the sons on the same cause of action. Therefore it could not be said that what had happened in the suit amounted to an adjudication that the sons were not liable in respect of the decree debt. *Doraisami* v. *Nagasami*[2] was decided by Coutts-Trotter, C.J. and Walsh, J., who also held that a decree passed against a father personally after the sons had been exonerated could be executed against the son's interests in the family property in respect of a decree debt passed against the father.

The facts in *Raja Ram* v. *Raja Bakhsh Singh* , on which King, J., based his decision were these. After the death of a Hindu the sons and grandsons were made defendants in a suit filed by a creditor of the deceased to recover the amount of the debt from their interest in the family properties. Before judgment the grandsons were dismissed from the suit, but it was sought to realise their interests in the property in execution proceedings. The Privy Council held that they were not liable inasmuch as they had been dismissed from the suit. The question of their liability was directly raised and as they had been dismissed from the suit they could not be made liable under the decree passed in it. That case differs from the case now before us in that there the suit was brought against the grandsons after the death of the grandfather against whom no decree had been obtained. The dismissal of the grandsons from the suit amounted to a decision in their favour, of the question of their liability. That is not the position here. A decree was passed against the father after the sons had been dismissed from the suit, and the passing of the decree gave to the decree-

1. (1937) 47 L.W. 60. 2. A.I.R. 1929 Mad. 898.
3. (1938) 1 M.L.J. 41 : I.L.R. 13 Luck. 61 (P.C.).

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holders a new right, which they could enforce against the sons. We do not consider that *Raja Ram* v. *Raja Bakhsh Singh*[1] has overruled the decision of the Full Bench in *Periasami Mudaliar* v. *Seetharama Chettiar*[2]. In our opinion the decision of the Full Bench remains unaffected and a decree-holder in circumstances like we have here may proceed to execute the decree against the sons' interests in the family property.

The appeals will be allowed with costs in this Court and in the second appeals but the advocate's fee will be allowed only in Appeal No. 97 of 1938 of this Court and in the corresponding second appeal. The result is that the decrees of the Subordinate Judge will be restored.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUNHI RAMAN.

Athiyappa Goundan .. *Petitioner* (Petitioner)*

v.

Ramanathan Chettiar .. *Respondent (Respondent).*

Athiyappa Goundan v. Ramanathan Chettiar.

Madras Agriculturists' Debt Relief Act (IV of 1938), Ss. 8 and 10, sub-S. 2 (2)—Mortgage for price of land purchased—If excepted from scaling down by reason of S. 10, sub-S. 2 (2)—Subsequent mortgage of other property for original mortgage debt—Effect.

A mortgage was executed for Rs. 7,000 on 4th November, 1914, the whole of the mortgage debt being the price payable by the mortgagors for lands purchased by them from the mortgagees and subsequent to the mortgage there was a partition among the mortgagors and after the partition the mortgage debt was split up and a subsequent mortgage for Rs. 2,500 of other ancestral properties was executed by the new mortgagor for the portion of the debt that fell to him and a decree was passed on that mortgage. When it was sought to be scaled down under S. 19 of Act IV of 1938,

Held, that S. 10, sub-S. 2 (2) of Act IV of 1938 is a sufficient answer to the petition for scaling down. In view of the scheme of the Act and in view of the wording of the clause the giving of other property as security did not affect the applicability of the clause in S. 10 as to the lien for unpaid purchase-money.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Salem dated 24th August, 1938 and made in E. A. No. 261 of 1938 in O. S. No. 52 of 1932.

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1. (1938) 1 M.L.J. 41: I.L.R. 13 Luck. 61 (P.C.).
2. (1903) 14 M.L.J. 84: I.L.R. 27 Mad. 243 (F.B.).

* C. R. P. No. 1657 of 1938. 17th November, 1939.

Athiyappa Goundan v. Ramanathan Chettiar.

K. P. Ramakrishna Aiyar for Petitioner.

K. S. Ramabhadra Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This is an application to revise the order made by the learned Subordinate Judge of Salem in E. A. No. 261 of 1938 in O. S. No. 52 of 1932.

The application before the lower Court was presented under S. 19 of the Madras Agriculturists' Relief Act IV of 1938 to scale down the amount of a mortgage decree. It is admitted that the original mortgage was executed for Rs. 7,000 on the 4th November, 1914, the whole of the mortgage-debt being the price payable by the mortgagors for lands purchased by them from the mortgagees. Subsequent to this mortgage and before the debt was discharged, there was a partition among the mortgagors and after that partition, by consent of parties, the mortgage-debt was split up with the result that under a fresh mortgage deed, Ex. C, security was given only for Rs. 2,500 which was the portion of the debt that fell to the mortgagors under that document. This was executed on the 22nd January, 1925. Under this mortgage deed, the properties that were given as security were not the lands that were originally purchased in 1914 but some of the ancestral properties of the mortgagors under this deed. The decree debt that was sought to be scaled down under S. 19 of the Act was under the decree passed to enforce this mortgage.

The application for scaling down was resisted in the Court below under S. 10, sub-S. 2, cl. 2 of the Act by the decree-holders. According to this clause, nothing contained in Ss. 8 and 9 of the Act shall affect any liability for which a charge is provided under S. 55, cl. 4, sub-cl. (*b*) of the Transfer of Property Act. The objection raised on behalf of the decree-holders was upheld by the learned Subordinate Judge who found that the exemption provided for in this clause clearly indicated that the Act was not intended to benefit debtors whose debts could be under the category of debts referred to in it.

Mr. Ramakrishna Aiyar, the learned Advocate for the Petitioner, argues that since under the fresh mortgage deed, Ex. C, the lands originally purchased by the mortgagors, in respect of which alone the charge provided for in S. 55 of the Transfer of Property Act can operate were not given as security and since fresh properties were given as security, the lower Court

erred in holding that the clause of S. 10 relied on by the respondents was applicable to the case. In view of the scheme of the Act and in view of the wording of the clause, I am not able to accept this contention as well-founded. The clause describes a particular category of debts in respect of which the debtor should not be given relief under the Act and it cannot be denied that the debt in the present case is included in that category. It is only equitable that a person who purchases property should pay the price that he agreed to pay. In these circumstances, I hold that the view taken by the Court below that the clause is a sufficient answer to the petition for scaling down the debt is correct. The Civil Revision Petition must therefore be dismissed with costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Madura, etc., Devasthanam through its Executive Officer R. S. Naidu at Madura .. *Petitioner* (Respondent-Plaintiff)*

v.

Masanam Pillai .. *Respondent (Petitioner-1st defendant).*

Madras Agriculturists' Debt Relief Act (IV of 1938), S. 15 and r. 6 (1)—Amount claimed by major inamdar against minor inamdar for water charges, land cess, etc., alleged to have been paid to Government by former—If 'rent'.

The relationship between major and minor inamdars is not that of landlord and tenant and S. 15 and r. 6 (1) of Act IV of 1938 would have no application to an amount decreed in favour of a major inamdar for water charges, land cess, etc, alleged to have been paid by the former to the Government.

Petition under S. 115 of Act V of 1908, and S. 224 of the Government of India Act of 1935 praying the High Court to revise the order of the Court of the District Munsif of Madura Taluk dated 14th November, 1938 and made in E. A. No. 489 of 1938 in E. P. No. 408 of 1937 in O. S. No. 157 of 1936.

K. Rajah Aiyar and *T. A. Ramaswami Reddiar* for Petitioner.

K. Rajasekharan for Respondent.

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*C. R. P. No. 481 of 1939.		19th January, 1940.

Madura, etc., Devasthanam v. Masanam Pillai.

The Court delivered the following

JUDGMENT.—The whole village of Bodinaikenpatti was granted to Devasthanams at Madura as a sarva inam by the Carnatic Rulers. This was a major inam; but at the time when this inam was brought into existence certain minor inams had already been granted in this village. One of these minor inams was purchased by the defendants' predecessors in title. A suit was instituted on behalf of the devasthanams against the defendants for the recovery of certain water charges, land cess, etc., the former of which were claimed on the ground that the water had been taken by the defendants for the second crop which they were not entitled to use without paying for it and the latter for what the plaintiff was alleged to have paid to the Government on behalf of the defendants. It is unnecessary to decide in this case whether the claim was made in respect of a tort committed by the defendants or as held by my learned brother Mr. Justice Somayya in *Sree Mullapudi Venkatarayudu* v. *The President, District Board, East Godawari*[1], in regard to the breach of an implied engagement. It is however necessary to remember that the suit was not instituted by a landlord against his tenant which would have been cognisable by a revenue Court—but by a major inamdar in a Civil Court against a minor inamdar. The plaintiff's suit was decreed, although the decree was not satisfied before the Madras Agriculturists' Debt Relief Act (IV of 1938) came into operation. The judgment-debtors consequently made an application for stay of execution under S. 20 and under r. 6 (1) framed under the Act. The District Munsif of Madura granted the application and stayed execution. This has led the decree-holder to come up to this Court in revision.

The only question to decide in this revision is whether the amount decreed in favour of the devasthanams falls within the definition of rent. If it did, it would fall within the ambit of r. 6 (1) framed under the Act. This rule refers to S. 15 and the section lays down the conditions under which rent due to landholders is to be deemed to be discharged. Relying on the Full Bench decision of this Court in *Kota Venkataraju Garu* v. *Maharaja of Pithapuram*[2]. The District Munsif was of opinion that the amount decreed came within the purview of

1. (1939) 2 M.L.J. 93.
2. (1938) 1 M.L.J. 256 : I.L.R. (1938) Mad. 381 (F.B.).

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the definition of rent. But he apparently overlooked the most important fact that the Full Bench decision was given in a case where an action was brought by a landholder to recover rent from his ryot while the relationship between the major and minor inamdars could not be held to be that of a landlord and tenant, even if it was assumed that the grants were made to both the inamdars by the same personage or authority. Since the relationship of landlord and tenant did not subsist between the parties, the suit was instituted in a Civil Court and not before the Deputy Collector as in the case decided by the Full Bench. If the jural relationship between the parties is not that of the landlord and tenant S. 15 of the Madras Agriculturists' Debt Relief Act or r. 6 (1) would have no application.

Rent has been defined by the Madras Estates Land Act to include

"whatever is lawfully payable in money or in kind or in both to a landholder for the use or occupation of land in his estate for the purpose of agriculture and includes whatever is payable on account of the use and enjoyment of waters supplied or taken for cultivation of land, where the charge for such water has not been consolidated with the rent payable for the land."

The above definition implies that the payment to the landholder must be by a person who is bound to pay rent for the land. The minor inamdar cannot be said to be under a liability to pay any rent to a major inamdar.

For the above reasons, r. 6 (1) could not be said to apply to the minor inamdars who made the application for stay and the application should not have been accepted by the Court below. The revision is, therefore, accepted and the order passed by the District Munsif set aside. The petitioner will have his costs in this Court.

K. S. —— *Petition allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD MACMILLAN, SIR GEORGE RANKIN AND MR. M. R. JAYAKAR.

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Satish Chandra Giri v. Dharanidhar Singha Roy.

Satish Chandra Giri and others .. *Appellants**

v.

Dharanidhar Singha Roy and others .. *Respondents.*

Code of Civil Procedure (V of 1908), Ss. 9 (explanation) and 92—Public religious institution—Mismanagement by mahant in administration of

* P. C. Appeal No. 78 of 1937. 3rd November, 1939.
Bengal Appeals Nos. 29 of 1934 and 2 of 1935.

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Satish Chandra Giri *v.* Dharanidhar Singha Roy.

property—Interference by Civil Court—Exercise by mahant of spiritual duties—Jurisdiction to interfere with—Suit relating to—If of civil nature within the purview of explanation to S. 9, Civil Procedure Code.

The two capacities filled by the mahant of a public religious charitable institution—namely those of its spiritual head and administrator of its property are in general closely intermingled, and where this is so, if it be found by the Court that the functionary, in the exercise of his duties, has put himself in a position in which the Court thinks that the obligations of his office in connection with the endowment can no longer be faithfully discharged without danger to the endowment, that is a sufficient ground for his removal from both his offices if necessary. S. 92 of the Code of Civil Procedure must therefore be construed as conferring in suitable cases jurisdiction on Civil Courts to deal with the religious side of the office of mahant. And in cases where the spiritual and administrative side of the mahantship are in fact closely intermingled, even if the two capacities can be separated, the spiritual side being regarded purely as a dignity, the office is yet of such a nature that a suit relating to it must fall within the purview of the explanation to S. 9 of the Code, as being a suit of a civil nature lying within the competence of a Civil Court, notwithstanding that the functions of the office are associated with religious rites and ceremonies. It may, however, be that mere mismanagement and incapacity is, in the case of certain high dignatories, not ordinarily sufficient for their removal from the performance of their religious duties as distinct from their duties as managers of the properties of their institutions. Such matters are for the consideration of the Civil Court, which must necessarily enjoy a wide discretion to decide what form of punitive or ameliorative order will meet the requirements of the case. The jurisdiction of the Civil Court to decide questions of this kind is beyond dispute.

Consolidated appeals from a judgment and decree of the High Court, Fort William in Bengal, dated 6th July and 24th August, 1934) (Mukherji and Ghose, JJ.) confirming a judgment and decree of the District Judge's Court at Hoogly dated 6th November, 1929.

The defendant, Satish Chandra Giri, was the mahant of the Shrine of Sri Taraknath near Calcutta. In September, 1922, the plaintiffs instituted the present suit claiming among other things a declaration that certain properties belonged to the deity and were not the only properties of the defendant; and a declaration that the defendant was not a fit person to continue as mahant, and an order appointing a fit person in his place. The action was brought under S. 92 of the Code of Civil Procedure and the defendant in his defence contended *inter alia* that the shrine was not a public, religious or charitable endowment within the meaning of that section and that certain properties were his *nij* (private) properties acquired from his predecessor. The District Judge found in favour of the plaintiffs on all points. The defendant appealed against that decision, and the plaintiffs cross-appealed, contending that the Judge ought to have ordered accounts to be taken on the

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footing of the defendant's wilful default. The High Court dismissed both appeals, and both parties now appealed to His Majesty.

The arguments are only reported on the question of law relating to the jurisdiction of the Court under S. 92 of the Code of Civil Procedure.

C. S. Rewcastle, K.C. and *J. M. Parikh* for Appellants.—It is submitted that, in making the order which it has made, the High Court has ignored the distinction which exists between a mahant's trusteeship and management of the temporal affairs of a temple on the one hand and his position as its spiritual head on the other. The two capacities of spiritual head and trustee in which he acts are clearly distinguishable, and S. 92 only gives the Court jurisdiction to interfere with a Mahant in the exercise of the duties pertaining to the latter capacity. Accordingly the Court will be exceeding its jurisdiction under the section if in dealing with the mahant in his temporal capacity as trustee, it makes an order which affects his spiritual position and concerning the spiritual affairs of the deity. The Court undoubtedly has the power to deprive a mahant of his trusteeship and of the temporal duties which go with it, but it must attain that result without interfering with his spiritual position. The appellant is charged with such different things as breach of trust and immorality, and S. 92 gives jurisdiction to interfere with the mahant only in respect of the former of these charges. The Court is not competent to inquire into the second matter, which was quite outside S. 92. The appellant is admittedly removable as a trustee if he be found to have done wrong; also there are persons who might have a right to claim his removal from the spiritual headship of the temple; but those persons are not before the Court in the present proceedings. If that argument is right, evidence of immoral conduct on the part of the appellant should not have been led in this action. Moreover a power of removal of a mahant does not imply power to appoint his successor. S. 92 is limited to questions of trusteeship and grants the Court no right directly or indirectly to interfere with the mahant in the exercise of his spiritual duties. (Counsel referred to *Acharya Shraj Sripati Prasadji* v. *Laxmidas*[1], *Ramanathan Chetti* v. *Murugappa Chetti*[2] and *Ram Parkash Das* v. *Anand Das*[3]).

(Sir George Rankin referred to *Syed Shah Muhammad Kasim* v. *Syed Ali Saghir*[4]).

To remove the appellant from the spiritual side of his office in proceedings under S. 92 would, it is submitted, be without precedent. For the attainment of that object there is special procedure.

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1. (1928) 31 Bom.L R. 243 (P.C). 2. (1906) L.R. 33 I.A. 139.
3. (1916) 31 M.L.J. 1: L.R. 43 I.A. 73: I.L.R. 43 Cal. 707 (P.C.)
4. (1931) I.L.R. 11 Pat. 288.

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In *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*[1], a clear distinction is made between ecclesiastical and secular duties. The view expressed at page 455 is admittedly now no longer good law, but the case is still of value as illustrating the distinction in question.

(Lord Macmillan referred to S. 9 of the Code, and Counsel referred to *Mahant Basant Das* v. *Hem Singh*[2]).

Parikh, following. In *Mohant Puran Atal* v. *Darshan Das*[3], the mahant had already been removed by a domestic tribunal on the ground of immoral conduct. There was no question of his removal in that suit. If it is to be said that the Court has power under S. 92 to remove a mahant from his spiritual duties the result must follow that it is possible under that section to remove him on the ground of immorality alone; but that, it is submitted, runs counter to the clear wording of the section.

A. M. Dunne, K. C. and *H. R. Abdul Majid* for Respondents.—S. 92 must, it is submitted, be regarded as dealing in a general way with trusts. Here we happen to be concerned with a religious trust. There is nothing in the section limiting the kind of breach of trust to which it is applicable, and the breach of trust here alleged is breach of a religious trust. The section deals with the direction and administration of a temple as a whole, and there is nothing in it to limit the Court's powers to interference with secular matters. *Mohant Puran Atal* v. *Darshan Das*[3], is in point here.

Counsel was stopped.

3rd November, 1939. Their Lordships' judgment was delivered by

Mr. Jayakar.

MR. JAYAKAR.—These two appeals are against a decree dated 6th July and 24th August, 1934, of the High Court of Judicature at Calcutta, modifying a preliminary decree dated 6th November, 1929, of the Court of the District Judge of Hoogly. The suit in which the decrees were passed was instituted under S. 92 of the Code of Civil Procedure 1908, by certain persons claiming to be interested in the administration of the shrine of Sri Taraknath near Calcutta, against one Satish Chandra Giri, the appellant in the main appeal (No. 29 of 1934) (hereinafter called the appellant), who was described as the shebait or mahant of the said shrine.

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1. (1904) 14 M.L.J. 105: I.L.R. 27 Mad. 435 at 454.
2. (1925) I.L.R. 7 Lah. 275.
3. (1912) I.L.R. 34 All. 468.

The shrine of Taraknath, though sometimes referred to in the present proceedings as a math, is in reality a temple containing an idol called Sri Taraknathji. Its origin is lost in antiquity. The High Court of Calcutta has in its judgment traced its history back to 1747 A. D., and there is no doubt that it is a very ancient public, religious and charitable endowment, of which the appellant had been for many years the mahant. It is unnecessary for the purposes of this appeal to enter into the details of its antiquity. It is sufficient to say that the succession to the mahantship descended from one Mohan Giri, the mahant in 1799, who acquired properties while he held that office. These properties along with the mahantship came to be vested, through successive holders, in one Madhab Giri in or about the year 1864. On 17th November, 1873, he executed a document in favour of his senior chela Shamchand Giri. By that document, Madhab Giri, who was at that time about to face a trial for sexual misbehaviour, appointed Shamchand Giri to manage, in the event of his incarceration, the properties of the temple during his absence. The properties were stated to be of twofold character: debottar (properties belonging to the temple) and *nij* (private properties of the mahant), of which a list was appended to the document. The document also provided that, on the return of Madhab Giri, Shamchand Giri was to hand over to him possession of both classes of property and render an account in respect of each, but if Madhab Giri died bafore his return, Shamchand Giri was to succeed him.

Madhab Giri was convicted and sentenced on 25th November, 1873. After his release in December, 1876, he obtained possession of all the properties from Shamchand Giri, but the latter instituted a summary suit for possession against Madhab Giri and obtained a decree on 28th August, 1877.

On 29th December, 1877, Madhab Giri instituted a suit against Shamchand Giri, on the strength of the document mentioned above, for the recovery of the properties in Shamchand Giri's possession. There were *inter alia* two schedules annexed to the plaint: schedule Ka, which was a list of debottar properties and schedule Kha, a list of the properties claimed as nij. Madhab Giri prayed, amongst other things, that, according to the document of 17th November, 1873, Shamchand Giri was bound to deliver possession and was not

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entitled to deny Madhab Giri's title or set up an adverse one and that it might be declared that the properties mentioned in schedule Kha were Madhab Giri's personal or private properties. Shamchand Giri contested the suit, mainly on the ground that he had no knowledge of the said document, that Madhab Giri had forfeited his title to the office of mahant by reason of his sexual misbehaviour and that Shamchand Giri had been duly appointed mahant in his place.

On 5th December, 1878, the District Judge delivered judgment, holding that Shamchand Giri was not a duly appointed mahant, that Madhab Giri had not forfeited the mahantship on account of his misbehaviour, that the document of 17th November, 1873, was genuine and Madhab Giri was entitled to keep possession of the properties therein mentioned. The District Judge further held that the properties in schedule Kha were not the nij properties of the mahant. In the result, he held that Madhab Giri was entitled to recover possession of the office of mahant, with the properties in both the schedules Ka and Kha, which belonged to the endowment of the idol. Madhab Giri's claim to the properties in schedule Kha as his private properties was dismissed. A decree dated 5th November, 1878, giving effect to the judgment, was drawn up. There was an appeal by Shamchand Giri and cross-objections by Madhab Giri. It is to be noted that in his cross-objections Madhab Giri raised no objection to the decision of the District Judge that the properties in schedule Kha were not the private properties of the mahant. Madhab Giri thereafter applied for possession in accordance with the decree, making no distinction between the two kinds of properties and eventually he recovered possession of both. These facts may not operate as an estoppel against the appellant, but their evidentiary value cannot be denied in connection with the appellant's contention in the present suit that the said properties and their accretions are his private properties.

Madhab Giri died on 11th March, 1893. He left a will dated 5th March, 1893, whereby he appointed the appellant his successor as mahant and also executor of the will. He devised the nij properties to the appellant absolutely. The appellant accordingly ascended the gadi and applied for probate of the will, which was granted by the High Court of Calcutta on 1st July, 1895.

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In September 1922, four persons, who are now respondents 1-4 in the first appeal and appellants 1-4 in the second appeal here, and three others, who have since died, instituted the present suit (No. 28 of 1922) in the Court of the District Judge of Hoogly, against the appellant. During the pendency of the suit, three other persons were added as plaintiffs and they are parties to these appeals. All these persons are hereinafter referred to as plaintiffs.

The suit was instituted under S. 92 of the Code of Civil Procedure. There were 13 prayers, out of which the following are material at the stage of this appeal:—

"1. For a declaration that certain properties specified in the schedules annexed to the plaint were not the *nij* properties of the appellant, but belonged to the deity.

"2. For a declaration that the appellant was not a fit and proper person to continue as mahant or trustee of the said trust estate and that he might be removed from such office by the order of the Court.

"3. That in his place a fit and proper person be appointed as mahant and trustee of the temple and of its properties.

"4. That all the properties adjudged to be trust properties be vested in the new mahant and that the appellant be directed to make over their possession to him.

"5. For an account.

"6. For the settlement of a scheme for the proper management and control of the trust properties."

The appellant contested the suit and denied the material allegations contained in the plaint. He filed a lengthy written statement. Shortly stated, his defence was that the temple was not a public, religious or charitable endowment within the meaning of S. 92; that the mahant managed the debottar properties as "malik" owner, that he took his predecessor's *nij* properties under an absolute bequest contained in his will, that he could and did acquire new properties, which were his *nij* properties, that he was not of immoral character, as alleged in the plaint, nor was he guilty of a breach of trust, nor of mismanagement or misappropriation of any part of the trust properties, that he was a fit and proper person to act as mahant, having acted as such for over 30 years and that he was not liable to render an account of the trust properties.

On these pleadings, the District Judge framed appropriate issues and delivered judgment on 6th November, 1929. He found all the issues in favour of the plaintiffs and also that the charges of immorality and misappropriation made against the

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appellant were proved. A decree was passed, of which the following are the material terms:—

"1. The Tarkeshwar endowment was a public, charitable and religious trust.

"2. The properties mentioned in certain schedules to the plaint were debottar properties of the temple.

"3. The appellant was not entitled to have any *nij* property of his own and the properties claimed by him as *nij*, whether acquired in his own name or in the names of other persons, belonged to the temple.

"4. The appellant was not a fit person to continue as mahant, that he was removed from that office and was to forthwith make over possession of all properties to the temple, to be vested in the receiver, pending further orders.

"5. The appellant was to render accounts of both sets of properties, from the day he ascended the gadi to the present time.

"6. A scheme for the proper administration and control of the trust estate was to be framed."

Against the said judgment and decree the appellant filed an appeal (1 of 1930). Plaintiffs also filed a cross-objection on the ground that, upon the findings arrived at, the Court below ought to have directed accounts to be taken from the appellant on the footing of wilful default. The appeal and cross-objection were eventually heard by a Bench of the High Court of Calcutta (Manmatha Nath Mukerji and Sarat Kumar Ghose, JJ.) who affirmed the findings of the District Judge and his decree, with the following variations:—

"1. The order for accounts against the appellant was set aside.

"2. Certain properties claimed in the plaint and held by the District Judge to be debottar properties were excluded from the decree."

The appellant's appeal and the plaintiffs' cross-objection were dismissed.

On the question of misappropriation and breach of trust by the appellant, the learned Judges held that the appellant had diverted trust funds for the purpose of self-aggrandisement and for the benefit of others who were not entitled thereto and that gross breaches of trust on a most gigantic scale had been proved against the appellant. On the issue relating to the appellant's moral character and habits of life, the High Court went into the details of the charges made against him and held them substantially proved. About the appellant's fitness to continue as mahant and his liability to be removed from his office the learned Judges observed that by reason of the continuous course of the misappropriation of trust properties in which the appellant had indulged on a most extensive scale, the breaches of trust

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which he had systematically committed in respect of such properties, the unfounded claim thereto which he had persistently put forward and in pursuance of which he had treated such properties as his own properties, and the life he had led which was repugnant to the intention of the trust, the appellant had rendered himself unfit to continue in such office. They further observed that infinitely more than what would justify the removal of a trustee of a public, religious and charitable endowment had been established, that, on the most charitable view of the appellant's conduct and his dealings with the endowment, it was impossible to resist the conclusion that the interest of the endowment peremptorily demanded the removal of the appellant from his office as mahant. In setting aside the District Judge's order for accounts against the appellant and in dismissing the plaintiffs' cross-objection on the same question, the learned Judges left it open to the deity or anybody, who would represent him in future, to recover such other properties as there might be belonging to the endowment and to sue the appellant for accounts.

The question of framing a suitable scheme was considered by the District Judge after the other issues had been decided. He delivered a separate judgment framing a scheme for the administration of the endowment. It was the subject of a separate appeal to the High Court and was disposed of by a separate judgment.

The appellant applied to the High Court for a certificate of fitness. It was granted to him in the main appeal (No. 29 of 1934) and refused in the appeal (No. 30 of 1935) relating to the framing of the scheme. A certificate (appeal No. 2 of 1935) was likewise granted to the plaintiffs respondents in respect of the liability of the appellant to account on the basis of wilful default.

Since the leave to appeal to His Majesty in Council was granted, the scheme has been given effect to and a new mahant and a committee of management have been appointed. They have taken over charge of the property from the Receiver. It is to be noted that the new mahant is not a party to the appeals before the Board and there is no question now before their Lordships relating to the scheme.

From the foregoing history of the proceedings it is clear that many of the questions arising in the appeal are concluded

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by concurrent findings of fact and there is strong reason in the present case why their Lordships should be slow to depart from the rule of practice, which, though not a rule of law nor a rigid rule, plays an important part in the exercise of the prerogative —that concurrent findings of facts will not be disturbed.

The question about the *nij* properties, which has been decided against the appellant, falls under this category. These properties are admittedly accretions to the original nucleus of five putni taluks, having been acquired out of their income.

In the light of past events, their Lordships find no difficulty in understanding the contention of the appellant and his predecessors as regards the *nij* properties. They were throughout claimed as the private and absolute properties of the mahant. Before the Board, however, the appellant's counsel sought to make a distinction and endeavoured to place them in an intermediate category of properties which, though personal and private, the mahant could not dispose of, as he was under an obligation to use their income, in case of deficiency, for the purposes of the temple, but as regards the surplus, he could dispose of it in any way he liked and was not liable to render an account thereof. Their Lordships find in the facts of this case no justification for such distinction, which may in certain cases be justified as the creature of the immemorial customs of the institution. In his defence, the appellant claimed the *nij* properties as absolutely belonging to him under the provisions of his predecessor's will, and the question must be decided on that footing, and cannot admit of the refinements urged by his counsel. Their Lordships see no reason to differ from the concurrent findings of the lower Courts on this question.

With reference to this question, there are undoubtedly a few subsidiary points on which the High Court disagreed with the District Judge, but, in their Lordships' opinion, this difference of view in no way weakens the main finding of the High Court, which is clear. The learned Judges held that upon the views, circumstances and probabilities they had dealt with, they had come to the conclusion, about the correctness of which they entertained no doubt whatever, that the claim to the *nij* properties which the appellant had asserted was entirely unfounded. They added that the material documents properly read were unequivocal in their terms and left no vestige of doubt that Mohun Giri (the original acquirer) never treated

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the putni taluks as his personal property, nor intended that Raghuchandra Giri (his successor) should ever regard them as such. The learned Judges went on to observe that, in arriving at this conclusion, they were not unmindful of the fact that they had not been able to ascertain the exact sources from which Mohun Giri had acquired the five parent taluks; but notwithstanding it, they were firm in their conclusion that there was no foundation for the supposition that he acquired or left any properties as his personal properties, as distinguished from the properties of the deity.

It was argued that in arriving at this conclusion, the learned Judges contradicted their view, expressed in an earlier part of the judgment, that the onus was on the plaintiffs to prove that the said properties belonged to the temple. Their Lordships, however, on a proper appreciation of the High Court's judgment, can detect no such contradiction. The entire evidence was before the learned Judges, which they considered with great care and scrutiny and their Lordships cannot allow the question to be reopened.

Likewise, on the question of the appellant's moral character and his consequent unfitness to occupy the office of mahant, there is a concurrent finding of fact which cannot be disturbed. It was argued that the appellant's moral character could not be considered in any suit under S. 92 of the Code of Civil Procedure. Their Lordships are unable to agree with this contention. The question of his character was not considered *in vacuo*, but as directly relevant to some of the issues which arose under S. 92, for example, his fitness to remain in office and his liability to be removed therefrom.

It may be noted that the decree of the lower Courts directing the appellant's removal from office was not based entirely on his immorality, but partially upon the finding of a continuous course of misappropriation of trust properties on a most extensive scale, the breaches of trust which he had systematically committed in respect of such properties, the unfounded claim thereto which he persistently put forward and in pursuance of which he treated such properties as his personal properties.

The main point argued before their Lordships is the following:—

The mahant, it is said, acts in two distinct capacities: he is the spiritual head of the endowment, the shebait of the deity.

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He is also the trustee and manager of the properties and temporal affairs of the temple and the deity. It is, therefore, contended that a Civil Court has jurisdiction under S. 92 of the Civil Procedure Code over his latter capacity only; it has no power to pass any orders affecting his spiritual position or his control over the spiritual affairs of the deity or endowment, and that, under that section, the Court can deprive him only of the trusteeship and management of the temporal affairs of the endowment, but it cannot remove him from his spiritual duties. A contrary view, it is contended, will enable a Civil Court to assume ecclesiastical jurisdiction over the religious affairs of the endowment.

Before their Lordships examine the soundness of this contention, it is material to note that during the long and protracted hearing of this case in the lower Courts, no distinction was made between the two sets of duties, and the question now urged before the Board was not raised in the appellant's written statement, is not dealt with in the exhaustive judgments of the Courts below, nor mentioned in the elaborate grounds of appeal to His Majesty in Council.

On the question whether the two capacities are distinct as alleged by the appellant or interrelated, it is useful to turn to the pleadings to ascertain what the common view of the parties was.

Para. 4 of the plaint is as follows:—

"The management of that sheba (worship) and sadabrata at the said math or shrine, and also of the debottar properties thereto appertaining and belonging to the said thakur (deity), was and has always been, according to the ancient customs and usage of the math, entrusted to a mahant, who, as the trustee thereof, discharges all the duties of a shebait in connection therewith. Save as aforesaid, as such shebait and trustee, the mahant of Tarakeswar has no personal or any other right to the said math and the properties thereto appertaining and belonging to the said thakur (deity)."

This allegation was met by para. 20 of the appellant's written statement, which is as follows:—

"According to the long-established custom and usage of the math, the mahant for the time being makes all arrangements for the sheba (worship) of the said thakur, etc., and manages the debottar properties as malik shebait of the said thakur and that whoever becomes the mahant of the math possesses the right to perform those acts by virtue of his office."

It is clear, therefore, that in the opinion of both the parties, the secular and the religious duties of the mahant, in the temple in question, are interdependent and inseparably blended; and

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such must be the case in any well-organised institution, if the obligations of the mahantship have to be effectively discharged.

The interconnection of the two aspects of the office was explained by Lord Shaw, who in delivering the judgment of the Board in *Ram Parkash Das* v. *Anand Das*[1] observed:—

"The mahant is the head of the institution. He sits upon the gaddi; he initiates candidates into the mysteries of the cult; he superintends the worship of the idol and the accustomed spiritual rites; he manages the property of the institution; he administers its affairs; and the whole assets are vested in him as the owner thereof in trust for the institution itself . . . . the succession to him in such property follows with the succession to the office."

The two capacities are thus closely intermingled and a proper and efficient discharge of the one depends on the control of the other. The mahant must have authority over the funds and income of the institution to be able to discharge his religious duties efficiently, in conformity with the customary and traditional obligations of the office and to the satisfaction of those who claim the benefit of the worship. He necessarily enjoys large patronage in the discharge of his religious functions. He cannot, in consequence, depend, for the due performance of such duties, on the mercy or caprice of another functionary, with separate or co-ordinate authority over the funds of the institution. Any division of the two capacities would lower his prestige, as also impair the efficiency of his religious functions. On the other hand, the funds of the institution have to be administered with a proper regard to the religious traditions of the institution and the sentiments of its worshippers, of which the mahant, for the time being, is the custodian and interpreter. He furnishes a salutory check upon the tendency, which experience proves is not at all infrequent, to administer the funds of the endowment with sole regard to secular and utilitarian considerations. In other words, in all such religious endowments, where tradition and custom play a vital part in intermingling the two functions, their division is unthinkable.

As pointed out in the case of *Striman Sadagopa* v. *Kristna*[2], such offices may have, in reality, a secular character, although religious duties are attached to them, because the occupants are called upon to exercise business functions, either as trustees or managers of the properties and funds of the temple, or as

1. (1916) 31 M.L.J. 1: L.R. 43 I.A. 73 at 76: I.L.R. 43 Cal. 707 (P.C.).
2. (1863) 1 Mad.H.C.R. 301 at 308.

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overseers in the regulations of its affairs generally and have necessarily civil rights and consequent liabilities, which may properly be made the subject of civil litigation.

There may, however, be cases where the duties of an office are purely spiritual and moral, entirely unconnected with any particular temple or place. The office may be such that no pecuniary benefit is attached to it or its emoluments are purely voluntary contributions, or the duties attendant to it are the exercise of spiritual and moral supervision over the voluntary actions of the worshippers. In such cases, it may be futile for a Civil Court to interfere with the exercise of the duties of the office. No rights of property are connected with it and there is no machinery by which the Court can control the voluntary action of the worshipper or the mahant.

The office in this case is, however, of a different character. It is connected with an endowment which has valuable properties and is associated with the control of extensive funds. Even if the two capacities of the office can be separated, and the mahantship on its spiritual side regarded as purely an office or dignity, there is no doubt that the office is of such a nature that a suit relating to it must fall within the purview of the explanation to S. 9 of the Civil Procedure Code, as being a suit of a civil nature lying within the competence of a Civil Court, notwithstanding that the functions of such office are associated with religious rites or ceremonies.

There are to be found in the reported rulings, both of this Board and of the Indian High Courts, numerous cases where shebaits, mahants, and in Muslim endowments, mutuvallis and sajjadanashins have been removed by Civil Courts from the performance of their temporal as well as religious duties, where the Courts have come to the conclusion, from the evidence adduced, that such removal was necessary in order to safeguard a faithful discharge of the obligations of the office. One such instance of removal is to be found in *Syed Shah Muhammad Kazim* v. *Syed Abi Saghir*[1]. Their Lordships agree with the observations of Khwaja Mohammad Noor, J., that:—

"Cases may be conceived in which a sajjadanashin or a spiritual head of a Hindu institution, say for instance, a mohunt of a sangat, may so behave

1. (1931) I.L.R. 11 Pat. 288. See also *Sarabjit Bharti* v. *Gauri Nath Kakaji*, (1923) 27 O.C. 149.

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himself that his very connection with the institution may be repulsive to the general public and may amount to desecration of the sacred places; I see no reason why the Courts cannot interfere in such cases."[1]

Their Lordships are aware that no general rule can be laid down befitting the different kinds of religious heads of varying sanctity and eminence. It must depend upon the facts of each case. It may be that mere mismanagement or incapacity is, in the case of certain high dignitaries, not ordinarily sufficient for their removal from the performance of their religious duties, as distinct from their duties as managers of the properties of the institution. It may also be that a Court, in certain cases, exercises a wise discretion in not directing their total exclusion from their religious office, where, for example, the lapses are due to causes like a misconception of their position or obligations. The Court may sometimes not order their total removal, but may associate with them a committee of management. But these are all matters for the consideration of the Civil Court, which must necessarily enjoy a wide discretion to decide what form of punitive or ameliorative order will suit the requirements of the case. But the jurisdiction of the Civil Courts to decide such questions can no longer be doubted.

The true rule in such matters can be stated to be that if it be found by the Court that the functionary, in the exercise of his duties, has put himself in a position in which the Court thinks that the obligations of his office in connection with the endowment can no longer be faithfully discharged without danger to the endowment, that is a sufficient ground for his removal, if need be, from both his offices.

Their Lordships' attention was invited to certain rulings, both of this Board and the High Courts in which enumerate and distinguish between the two sets of functions—secular and religious—performed by such religious heads These rulings, in their Lordships' opinion, merely enumerat and classify such functions. None of them has proceeded so far as to lay down that in cases like the one before their Lordships, where both the functions are intermingled and inter-dependent and have always been held and performed throughout the long history of the endowment by the same individual, the Court in a fit case will not have the power to remove the individual from the performance of both the functions.

1. (1931) I.L.R. 11 Pat. 288 at 346.

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The appellant's counsel conceded, at an early stage of his argument, that the temple in this suit was a trust for public purposes of a charitable or religious nature within the purview of S. 92 of the Code of Civil Procedure. If so, it cannot be doubted that the entire office of mahant, which according to the admission of the parties and the evidence in the case is and has always been indivisible and held by the same individual, falls within the operation of that section. No words are to be found either in S. 92 or elsewhere excluding the religious part of the mahant's duties from the operation of that section. The only limit to the Court's jurisdiction to entertain suits under that section is to be found in the provisions of S. 9 of the Civil Procedure Code, but, for reasons already explained, the spiritual portion of the office in this case—assuming that it could be separated from the secular—is so intimately connected with the exercise of rights to property that a suit relating to it cannot be said to be outside the purview of S. 9.

Perhaps the most vital consideration which their Lordships are unable to ignore is the fact that S. 92 has been construed, by a long course of Indian decisions, as conferring, in fit cases, jurisdiction on Civil Courts to deal with the religious side of such offices. This interpretation has a sound basis; no reason has been shown against it and their Lordships are unwilling to take a narrower view of the section, which may make it inadequate to meet Indian conditions.

A grievance was made by the appellant's counsel that the Courts in India were in error in not giving directions in the decree that the appointment of a successor to the appellant in the office of mahant was to be in conformity with the customs and usages of the endowment. The record of the appeal which is before the Board supplies no reason for imagining that the new mahant was appointed in violation of such usages. He is not a party to the appeal nor is the scheme, which embodies the rules regulating such appointment, before the Board. It is not, therefore, possible to deal with this question.

It now remains to deal with the plaintiffs respondents' cross-appeal. It relates to the accountability of the appellant for his dealings with the trust properties. It is contended that, on the concurrent findings of the Courts in India that the appellant has been systematically misappropriating the property of the endowment, an order for accounts on the basis of wilful

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default ought to have been passed by the High Court. Their Lordships are clearly of the view that the evidence leaves no doubt that the appellant has rendered himself accountable for the various acts of malversation and breaches of trust committed in the course of his management. But, as the learned Judges of the High Court have pointed out, there are difficulties in passing at this stage a decree for accounts against the appellant. A scheme for the management of the endowment has been framed which is not before their Lordships. A new mahant has been appointed and has taken over charge of the endowment. He is not represented here. Intricate questions of law requiring careful consideration will arise in the course of the determination of this issue and, in their Lordships' opinion, having regard to all these considerations, it is desirable to leave this question to be determined by the new mahant, who will have liberty to apply to the District Judge for the trial of this issue. In doing so, he may consult, if he so desires, those who are associated with him in the management of the institution, but it will be his exclusive responsibility to proceed with the matter or not. Instead of being driven to a separate suit, the new mahant will be permitted to have this question determined by an application in this suit, after he has had sufficient time to consider the question in the light of the Board's decision of this appeal. The respondents' counsel has agreed to this course.

Their Lordships will, therefore, humbly advise His Majesty that the decree of the High Court be affirmed and the appeal dismissed. The appellant will pay the costs of the respondents who appeared of this appeal. The respondents' cross-appeal will be dismissed, and they will bear a twenty-fifth share of the costs of the main appeal payable by the appellant.

Solicitors for Appellants: *T. L. Wilson & Co.*

Solicitors for Respondents: *W. W. Box & Co.*

R.C.C.
K. S.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GENTLE.

M. Raghavachariar .. *Appellant** *(Plaintiff)*

v.

Ponnuswami Mudali .. *Respondent (5th Defendant).*

Raghavachariar *v.* Ponnuswami Mudali.

Costs—Suit upon mortgage—Mortgaged property sold previously to a third person before suit—Agreement by purchaser to pay off mortgagee with the amount due to the mortgagor-vendor—Failure to fulfil condition—Purchaser, a party to the suit—Discretion of Judge in affixing liability of costs in the suit.

Wide powers of discretion are given to a Judge when considering the question of costs. His discretion must be exercised judicially and must be in accordance with general principles of law.

Where a purchaser of a property in possession was a necessary party to a suit upon a mortgage of the property by the mortgagee, and upon the facts disclosed and on information before Courts below, the suit was found to have been occasioned by the purchaser in having not carried out the contract as between himself and the vendor, namely, the condition to pay off the mortgagee with the amount of the sale price and thereby himself occasioned the filing of suit by the mortgagee against the mortgagor,

Held, that the order of the trial Court in directing the purchaser who was a party to the suit to pay the costs personally was right, or at any rate was one, which in the exercise of his discretion, he was entitled to make.

Appeal against the decree of the District Court of Chingleput in A. S. No. 306 of 1934 preferred against the decree of the Court of the District Munsiff of Chingleput in O. S. No. 362 of 1933.

M. S. Venkatarama Aiyar for Appellant.

K. Venkataramani for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal by the plaintiff in the suit against the order of the lower appellate Court which reversed the order of the trial Court directing the fifth defendant personally to pay the costs of the suit. The facts are as follows. The first defendant as mortgagor executed on the 29th October, 1921, a mortgage in favour of the plaintiff. On the 15th November, 1923, the fifth defendant bought one item of the mortgaged property which had been put up for sale, the purchase price being Rs. 1,434 and the vendor being the mortgagor. The fifth defendant as purchaser gave an undertaking to

* S. A. No. 752 of 1935. 21st February, 1939.

the vendor to pay to the plaintiff the sum of Rs. 1,240 out of the purchase price to be devoted towards the mortgage debt. There was no contract or privity of contract between the mortgagee and the fifth defendant as purchaser. The fifth defendant gave to the mortgagee (plaintiff) a promissory note for Rs. 340 in 1924 and subsequently made a small payment of Rs. 105. In order to enforce the promissory note the plaintiff was compelled to sue and obtain a decree against the fifth defendant upon that instrument. No other payments were made although the purchase was made by the fifth defendant in 1923. In his evidence he stated that he refrained from making any further payments to the mortgagee since he had been informed by some rumour in the village where he lives that the first defendant was becoming insolvent and that he might find himself in difficulties if he made payments to one person when another person was legally entitled to the money. This rumour reached him only about 1930, that is to say, about 7 years after he had bought the property and long after time when he should have paid for this purchase. It may also be mentioned that he never made any payment to the mortgagor and remained in occupation and enjoyment of the property. The suit in the Court below was filed in October, 1933, the claim being upon the mortgage debt for a decree to be satisfied within a specified time, failing which the property to be put up for sale and the sale proceeds devoted towards the mortgage debt and for a decree for any balance left over against the mortgagor and the members of his family who would be responsible. The plaintiff as mortgagee was entitled to ask in the suit for a personal decree against the mortgagor and those responsible and that failing discharge the property should be put up for sale. The fifth defendant was in occupation and it follows that he was a necessary party to the suit. In drafting the decree the learned District Munsiff directed, as was claimed in the plaint, that the fifth defendant personally should bear the costs of the suit since through his conduct the mortgagee was forced to take proceedings in the suit. The fifth defendant appealed against the decision of the trial Court and the learned District Judge on appeal reversed the trial Court's finding and directed that the costs should not be borne by the fifth defendant.

The main contest appears to have been that since the plaintiff was not a party to the arrangement or understanding between the fifth defendant and the mortgagor that the sale price

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of the property should be paid to the mortgagee, the plaintiff, no order for costs should be made against the fifth defendant. It is quite clear that no claim could be made by the plaintiff against the fifth defendant in pursuance of an arrangement made between the latter and the mortgagor. The learned District Munsiff by whom the suit was tried appears to have examined the matter very fully when he was making up his mind whether the fifth defendant should bear the costs of the suit. Wide powers of discretion are given to a Judge when considering the question of costs. His discretion must be exercised judicially and must be in accordance with general principles of law. Undoubtedly, and it is conceded, the fifth defendant was a necessary party to the suit and upon the facts disclosed and on information before all Courts the suit itself was occasioned only by the conduct of the fifth defendant, not that he failed to carry out any contract as between himself and the plaintiff but that having purchased this property he promised the vendor to pay the price to the plaintiff. He did not carry out that promise nor did he pay his vendor the price which he had bargained to give for the property, possession of which he took. It was his failure to carry out his contract of purchase and pay the purchase price that occasioned these proceedings. The lower appellate Court has reversed the learned District Munsiff principally it would appear on the ground that since there was no privity of contract between the fifth defendant and the plaintiff (mortgagee) no order for costs should be made against the former in respect of the suit transaction. Before a decision in regard to costs is reversed it must be shown that the order has been made contrary to a proper exercise of discretion and general principles of law. I cannot say that the learned District Munsiff has acted improperly or contrary to general principles and has exercised his discretion in a wrong way. In my view the order which he made was the correct one or at any rate one which in the exercise of his discretion he was entitled to make and it has not been shown that he exercised his discretion wrongly. It follows that the reversal of his decision by the learned District Judge was wrong. The fifth defendant has himself alone to blame and that was the reason which operated in the mind of the learned District Munsiff when he exercised his discretion.

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This appeal is accordingly allowed with costs both here and in the lower appellate Court and the order of the trial Court is restored.

Leave to appeal is refused.

K. C. ——— *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE SOMAYYA.

Raja Srimanthu Muthu Vijia Ragunatha Duraisingam *alias* Gowri Vallabha Thevar Avergal, Zamindar of Sivaganga, through the Estate Collector, Sivaganga .. *Appellant**

v.

Periasami Pillai and others .. *Respondents (Defendants).*

F.B.

Zamindar of Sivaganga v Periasami Pillai.

Madras Estates Land Act (I of 1908), S. 187 (1) (e)—Agreement to commute rent in kind to money—Registration of agreement, whether necessary—Agreement, whether violating provisions of the Act—Commutation order whether necessary—Remedies and safeguards against unfair enhancement.

The Madras Estates Land Act does not prohibit the landholder and the tenant agreeing to change the basis of the rent, provided that it does not lead to an enhancement of the rent. S. 187 (1) (*e*) of the Act means that where rent is payable in kind, a tenant shall not be bound by a contract which prevents his applying for an order under S 40. He can agree to pay his rent in money and if he does so there is no need for an order of commutation. The position contemplated by S. 40 no longer exists. If the money rent agreed upon turns out to be unfair to the tenant he is not without his remedy because Ss. 55 and 57 provide ample safeguards.

Agricultural leases which do not exceed the term of one year are exempt from stamp duty and registration. But a consent statement in the form of an agreement to pay the landholder in money for the crops raised, however, is on a different footing, as it amounts to an agreement to pay rent in money instead of in grain and contemplates a permanent tenancy at a definite money rent. Such an agreement which varies the rent payable by the lessee requires registration

Subramanian Chettiar v. *Arunachalam Chettiar*, (1902) 12 M.L.J. 479: L.R. 29 I.A. 138: I.L.R. 25 Mad. 603 (P.C.) and *Durga Prasad Singh* v. *Rajendra Narayan Bagchi*, (1913) 26 M.L.J. 25: L.R. 40 I.A. 223: I.L.R. 41 Cal. 493 at 506 (P. C.).

*S. A. Nos. 146 to 175, 178 to 192, 194 and 195 of 1934. 20th November, 1939.

F.B.

Zamindar of Sivaganga v. Periasami Pillai.

Appeals against the decrees of the District Court of Ramnad at Madura in A. S. Nos. 124, etc., of 1930 respectively preferred against the decrees of the Court of the Additional Special Deputy Collector of Manamadura in S. S. Nos. 2667 of 1929, etc., respectively.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *K. Subramanyam* for Appellant.

B. Sitarama Rao and *V. Ramaswami Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—These appeals raise a number of questions of importance to landholders and ryots in the Madras Presidency. The appellant is the Zamindar of Sivaganga, which is one of the important Zamindaries of Southern India. Before 1922 it was the custom of the tenants to pay their rent in kind, but in that year the Court of Wards, which was then in charge of the estate, formulated a scheme for the permanent commutation of rent in kind to rent in money. The scheme provided for the tenants signifying their acceptance in writing of the proposal and for the exchange of *pattas* and *muchilikas* drawn up on the new basis. At the time the scheme was viewed with favour by the tenants. Practically all of them signed consent statements and many of them accepted *pattas* which stipulated for the payment of the rent in money, but owing to the large number of tenants it was not possible to complete the arrangement by the issue of *pattas* to all of them while grain prices remained stable, and some tenants refused to accept the *pattas* tendered when their turns came, because prices had fallen. In 1928 the appellant filed a number of suits for the recovery of money rents on the footing that there had been a valid commutation. Some of the suits were defended on the ground that the appellant was not entitled in law to payment of rent in money. In other cases the appellant had distrained and had taken proceedings for the sale of the holdings for the non-payment of rent in money. The question of the legality of the demand for rent in money having been raised, some of the tenants filed suits contesting the right of the appellant to distrain or to sell. In September, 1930, there were pending in the Revenue Court 2310 suits in which the appellant or tenants were the plaintiffs. These suits were tried by three Deputy Collectors, but for the purposes of this appeal it is only necessary to refer to the judgment of one of them, namely, that of Mr. Amiritaswami Pillai, which

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was delivered on the 15th September, 1930. In 94 cases appeals were filed in the Court of the District Judge of Ramnad, who dealt with them in one judgment. Second appeals were filed in 50 cases and 47 of these appeals are now before us. The learned Counsel engaged in the appeals have agreed that this Court can also conveniently deal in one judgment with all the questions raised.

Before referring to the judgments below it is necessary to examine the terms of the consent statements signed by the tenants, the terms of the *pattas* which were issued in pursuance of those statements, and certain of the provisions of the Madras Estates Land Act, 1908. There were two forms of consent statements. These have been marked as Ex. A and Ex. A-1 respectively. Ex. A reads as follows:

"When the Settlement Officer inspected the said lands for the levying of cash *theerva* for the undermentioned *nanjas* and *punjas* relating to division by *waram* which pertain to my *patta* aforesaid and which are in my enjoyment in the said village, I was also present. As regards those lands I have agreed to the *tharamwar* division having regard to the nature of the lande set out below. I consent to the levying of compound *theerva* cash *theerva* per acre per annum for both crops inclusive of the winter and summer crops according to the rate fixed against them. As regards the bundle of sheaves *kaipichai* (alms) and mason and carpenter bundles to be given usually to the village servants, I shall give them personally. Besides these, I agree to pay the rate fixed per rupee in respect of the undermentioned cash *theerva*, *magamai*, *swatantaram*, and road cess in connection with the melwaram due to the Zamindar. If cash *theerva* is fixed in that manner, I am willing to obtain *patta*."

The word '*Magamai*' means contribution for charity and the word '*Swatantaram*' the charge made on tenants in respect of services rendered by village officers. While this statement clearly contemplates the fixing of rent on a cash basis it cannot, by reason of the concluding sentence, be read as being anything more than an undertaking by the tenant to accept a *patta* if a *patta* be drawn up in accordance with the terms mentioned in the statement signed by him. In other words, it is merely an offer by the tenant and not a completed agreement. The agreement could only be completed by the tender to the tenant of a *patta* drawn up in accordance with his offer.

The consent statement in the form of Ex. A-1 is very differently worded. It says:—

" In view of the advantage resulting from the conversion of *waram*, *varisai*, etc., taxes fixed for my lands in my holding and specified in the schedule below, into cash tax, the Estate Officer has inspected the said lands to fix a reasonable and proper cash *theerva* having regard to the nature

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of the land and the facilities and otherwise thereof, and fixed the *tharam* and also the rate against each land; and I have agreed to the same being satisfied with the fairness thereof. Hence I agree to pay for ever from fasli 133 to the land-holder the *theerva* due according to the same in each fasli.

Further I agree to pay to the landholder, *magamai*, *swathantaram*, etc., at pies per rupee and land cess and stone tax, etc., and sheaves, alms, covil virappu, mason and carpenter bundles,etc., usually due to the village servants. As regards *theerva* due for each land now, I have hereby agreed to pay, for ever, the same in each fasli whatever kind of crop is raised and whatever may be the number of crops raised in each fasli. Exchange of *pattas* and *muchilikas* as soon as they are prepared as shown in the reverse hereof, is hereby agreed to."

This goes far beyond an offer. It constitutes a definite agreement to pay rent for ever in accordance with the figures set out in the document.

The Madras Estates Land Act, 1908, was amended in 1934 and again in 1936, but all these cases arose before the amendment in 1934, and, with the possible exception of S. 187, regard can only be had to the sections of the Act as they stood in 1908. Therefore unless otherwise mentioned in this judgment the statements of the various provisions of the Act do not embody the amendments. S. 50 (2) states that every ryot shall be entitled to call upon his landholder to grant him a *patta* for any current revenue year and every landholder shall be entitled to call upon his ryot to give him a *muchilika* for any current revenue year in exchange for a *patta*. S. 51 sets out what the *patta* and the *muchilika* shall contain. S. 52 says that *pattas* and *muchilikas* may be exchanged for periods of one or more revenue years, but no landholder shall be bound to tender and no ryot to accept, a *patta* for a period of more than one revenue year. *Pattas* and *muchilikas* accepted, exchanged or decreed for any revenue year shall remain in force until the commencement of the revenue year for which fresh *pattas* and *muchilikas* are accepted, exchanged or decreed: provided that where a *patta* or *muchilika* has continued in force for more revenue years than one, no fresh *patta* or *muchilika* for the same holding shall take effect until the commencement of the revenue year next succeeding that in which it is tendered, accepted, exchanged or decreed. S. 53 states that no landholder shall have power to proceed against a ryot for the recovery of rent by distraint and sale of his movable property or by sale of his holding unless he shall have exchanged a *patta* and *muchilika* with the ryot or tendered him such a *patta* as he was bound to accept or unless a valid *patta* or *muchilika* continues in force.

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S. 55 provides that when a landholder, for three months after demand, fails to grant a *patta* in such terms as the ryot is entitled to receive, it shall be lawful for the ryot to sue for a *patta* before the Collector. S. 56 gives the landholder the same right to sue for the acceptance of a *patta* by a ryot when the ryot for one month after tender fails to accept the *patta* tendered to him and to give a *muchilika* in exchange. In suits arising under S. 55 or S. 56 the Collector is given by S. 57 the power to settle the terms of the *patta* and the *muchilika*. Therefore where a *patta* has expired the tenant, if he remains in occupation, continues to hold under the terms embodied in the expired *patta* unless a new *patta* is granted by the landholder or settled by the Collector under S. 57.

S. 40 of the Act provides that where a ryot pays rent in kind or on the estimated value of a portion of the crop, or at rates varying with the crop, or partly in one of these ways and partly in another, or partly in one or more of these ways and partly in cash, either the ryot or the landholder may sue before the Collector to have the rent commuted to a definite money rent. S. 187 (1) (*e*) states that nothing in any contract between a landholder and a ryot made before or after the passing of the Act shall take away the right of a landholder or an occupancy ryot to sue for a commutation of rent under S. 40. By the Madras Estates Land (Amendment) Act, 1934, the word 'apply' has been substituted for the word "sue" in S. 187 (1) (*e*). Inasmuch as this section applies to a contract before and after the passing of the Act it has been suggested that the amended section applies to the present appeals. But the question is not of importance because nothing really turns on whether the right is "to sue" or "to apply" for commutation of rent. The main question is whether an agreement between the appellant and a tenant for the commutation of a grain rent to a money rent is rendered unlawful by reason of S. 187 (1) (*e*). The appellant says that where a tenant has agreed to pay rent in money instead of in kind S. 40 has no application. For the tenants it is said that S. 187 (1) (*e*) renders the agreement void and the tenant is entitled to apply at any time under S. 40 for commutation of rent payable in grain to a definite money rent.

The Revenue Court's findings may be summarised as follows: (1) A consent statement whether in the form of

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Ex. A or of A-1 does not require to be stamped or registered, and this applies also where a *patta* and a *muchilika* have been exchanged; (2) the mere tender of a *patta* by the appellant toa tenant in pursuance of the terms of a consent statement does not amount to a completed agreement and the appellant is not entitled to sue for rent on the basis of a mere tender of *patta*; (3) where a *patta* has been accepted and a *muchilika* exchanged the arrangement for the payment of a money rent is binding on the tenant who is not entitled to apply for commutation of rent under S. 40; and (4) a *patta* which has been accepted, exchanged or decreed continues in force by virtue of S. 52 (3) notwithstanding that the period for which it was issued has expired. On these findings the Revenue Court held that the appellant was only entitled to file rent suits in cases where *pattas* and *muchilikas* were exchanged and that the tenants were entitled to have the proceedings by way of distraint or for sale of holdings set aside in all cases where the landholder had relied merely on the signing of consent statements or on the signing of such statements followed only by the presentation of *pattas*.

The findings of the District Judge were these:—(1) There is a right to contract apart from the Act, but this right does not affect the force of S. 187 (1) (*e*) and in spite of a completed agreement for the payment of rent in money the tenant has the right of applying to the Revenue Court for the fixing of a money rent under S. 40; (2) the appellant had taken advantage of the trust of his tenants; he had created new tenancies under new rates and upon new terms which were entirely unfavourable to the tenants and he had been guilty of 'legal fraud'; (3) even where *pattas* and *muchilikas* has been exchanged the appellant had not regarded himself as being bound by their terms; and (4) in as much as the consent statements had not been stamped there could be no contract, even where a *patta* and a *muchilika* had been exchanged.

I will first deal with the questions of stamping and registration. A consent statement in the form of Ex. A obviously does not call for stamping or registration, being merely an offer, and the position is not altered by the presentation of a *patta* in accordance with the offer or the exchange of a *patta* for a *muchilika*. None of the *pattas* tendered was for more than one year. Agricultural leases which do not exceed the

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term of one year are exempt from stamp duty and registration (Art. 35 of the Stamp Act and S. 17 of the Registration Act). A consent statement in the form of Ex. A-1 is, however, on a different footing, as it amounts to an agreement to pay rent in money instead of in grain and contemplates a permanent tenancy at a definite money rent. An agreement which varies the rent payable by the lessee requires registration. (See *Subramanian Chettiar* v. *Arunachalam Chettiar*[1] and *Durga Prasad Singh* v. *Rajendra Narain Bagchi*[2], affirmed on appeal to the Privy Council in *Durga Prasad Singh* v. *Rajendra Narain Bagchi*[3].) Therefore in those cases in which the consent was in the form of Ex. A-1 stamping and registration were necessary before the statement could be put in evidence and as the requirements of the Stamp and Registration Acts were not complied with, the statement could not be proved. In such a case the appellant could not rely on the mere presentation of a *patta* and the agreement could only be proved if a *patta* and a *muchilika* were actually exchanged. If they were exchanged they could be put in evidence without stamping or registration because they did not purport to create a tenancy for more than one year. It has been contended that as the *pattas* actually issued stated that the rents were not liable to any alteration except for reasons contemplated in S. 41 of the Madras Estates Land Act and as the *pattas* were intended to bind the tenants, their heirs and assigns registration was necessary. But this contention cannot be accepted. The governing factor is that each *patta* was for one year only. The fact that a *patta* contains statements which are intended to bind the tenant if he happens to remain in occupation for a longer period will not turn the *patta* into a lease for more than one year.

There is no justification whatever for the findings of the District Judge that the new arrangement in all cases had resulted in enhancement of rent and that the landholder had acted unfairly. The District Judge based these sweeping statements upon an examination of one case. S. 24 of the Act provides that the rent shall not be enhanced except as provided by the Act, but on the printed record there is no indication that there has been general enhancement. The arrangement for the

1. (1902) 12 M.L.J. 479: L.R. 29 I.A. 138: I.L.R. 25 Mad. 603 (P.C.).
2. (1909) I.L.R. 37 Cal. 293.
3. (1913) 26 M.L.J. 25: L.R. 40 I.A. 223: I.L.R. 41 Cal. 493 at 506 (P.C.).

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payment of rent in money was made while the estate was under the control of the Court of Wards. As a preliminary to the introduction of the system a survey was carried out by the Madras Survey Department. The lands were classified and the money rents were based on the average income for a number of years. While there is no reason to suppose that the calculations were not fairly made the Act does not permit of a standard rent being charged where it would mean an increase in the rent. Therefore each case will have to be considered on its merits. If it is shown that in any particular case the rent fixed is higher than before, the tenant will not be bound to pay it, even where a *patta* has been accepted and a *muchilika* exchanged because the arrangement would be illegal under S. 24.

The finding of the District Judge that the appellant has not regarded himself as being bound even where *pattas* and *muchilikas* have been exchanged also cannot be accepted. His finding here was based on his view of the evidence in two suits only. In each case the suit was for the *waram* because the *pattas* and *muchilikas* had been lost. There is no justification whatever for the District Judge's opinion that the appellant has resiled from agreements made by him or on his behalf.

Turning now to the question whether S. 187 (1) (*e*) renders an agreement to pay rent in money instead of in kind unlawful it is to be observed that this Court has recognised the right of the landholder and the tenant to agree to the permanent commutation of a grain rent into a money rent. In *Varada Reddi* v. *Srinivasa Mudaliar*[1], it was held that a landholder was entitled to revert to the *waram* system unless the tenants established that it had been superseded permanently as the result of a contract, express or implied, for the payment of rent in money. Similar decisions were given in *Ayyamperumal Odaiyan* v. *S. R. M. A. R. Ramaswami*[2], and in *Muthiah Chettiar* v. *Periyan Kone*.[3] In none of these cases, however, was the question of the effect of S. 187 (1) (*e*) considered. As I have pointed out, S. 40 gives the right to the landholder or the ryot to apply to the Collector to have rent payable in kind commuted to a money rent. Mr. Sitarama Rao has conceded that where a permanent arrangement for the payment of rent in money was entered into before the Act a

1. (1923) 45 M.L.J. 199. 2. (1915) 29 M.L.J. 362.
3. (1919) 11 L.W. 311.

tenant would not have the right to apply under S. 40, but he says that S. 187 (1) (*e*) prevents him from entering into any such contract after the passing of the Act. If before the Act a tenant could agree to change the *waram* for a money rent I fail to see how S. 187 (1) (*e*) alters the position. S. 187 expressly applies to contracts made before and after the passing of the Act. Therefore, if the section has the effect which the respondents say it has it would render void any contract of this nature made before the Act came into force, but it is admitted that it does not apply to contracts entered into before the Act was placed on the statute book. The Act does not prohibit the landholder and the tenant agreeing to change the basis of the rent provided that it does not lead to an enhancement of the rent, and I consider that S. 187 (1) (*e*) means that where rent is payable in kind a tenant shall not be bound by a contract which prevents his applying for an order under S. 40. He can agree to pay his rent in money and if he does so there is no need for an order of commutation. The position contemplated by S. 40 no longer exists. If the money rent agreed upon turns out to be unfair to the tenant he is not without his remedy. Ss. 55 and 57 provide ample safeguards.

The suits out of which the appeals have arisen and are now before us will be remanded to the Revenue Court for reconsideration and decision in accordance with the following directions:—

Rent suits filed by the appellant.

The appellant will, subject to a qualification which follows, be entitled to decrees for rent in those cases in which the tenants have signed consent statements in the form of Ex. A and to whom *pattas* have been presented in accordance with such statements. The appellant will also be entitled to decrees in which *pattas* and *muchilikas* have been exchanged and have remained in force. He will not be entitled to decrees in those suits in which consent statements in the form of Ex. A-1 have been signed unless *pattas* and *muchilikas* have been exchanged. But in no case will he be entitled to a decree where the money rent exceeds the value of the grain rent which applied before the new system was introduced. Where the appellant cannot claim rent in money he will be entitled to the grain rent provided he amends his plaint.

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The tenants will be entitled to decrees in cases where there were no consent statements signed unless they accepted *pattas*. In cases where the consent statement was in the form of Ex. A and *pattas* were tendered the suits will not lie. Where *pattas* were accepted the tenants will still be entitled to succeed if the money rents exceeded the value of the grain rents ruling before the commutation.

These directions will only apply to the suits in which decrees have been passed and are now under appeal. Where no appeal has been filed the decree of the Revenue Court or of the District Court as the case may be must stand.

The appellant having succeeded in the main he is entitled to his costs, and we fix the advocates' fee in each case at Rs. 10.

The appellant is entitled to the refund of the court-fee paid on the memoranda of second appeals under S. 13 of the Court-Fees Act.

K. C. —— *Appeals remanded.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE SOMAYYA.

Gundavarapu Seshamma ... *Appellant** (*Plaintiff-Appellant*)

v.

Kornepati Venkata Narasimha Rao and others .. *Respondents* (*Defendants-Respondents*).

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Hindu Law—Adoption by widow—Consent of sapindas—Want of consent of daughter's son—If invalidates adoption.

Practice—Division Bench not accepting as correct a decision on a question of law of another Division Bench of same High Court—Necessity to refer to Full Bench.

The only ground on which a daughter's son can really claim to be consulted in an adoption by a widow, is his interest in the property. He is not a member of the family and is only regarded as a sapinda for purposes of succession. Where the widow has received the consent of her husband's nearest agnates the fact that the major son of her daughter did not consent does not invalidate the adoption.

* S. A. No. 174 of 1936. 16th November, 1939.

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Texts and authorities fully examined.

Viswasundara Rao v. *Somasundara Rao,* (1920) I.L.R. 43 Mad. 876 and *Anne Brahmayya* v. *Chelasami Rattayya,* (1924) 20 L.W. 503, view of Jackson, J., *Murahari Brahma Sastri* v. *Sumitramma,* (1933) 66 M.L.J. 577: I.L.R. 57 Mad. 411 and Mayne, 10th Edition, pages 223-5, followed.

Anne Brahmayya v. *Chelasami Rattayya,* (1924) 20 L.W. 503 (Ramesam, J's. view) and *Kesar Singh* v. *Secretary of State for India,* (1926) 51 M. L. J. 16: I.L.R. 49 Mad. 652, overruled.

Per *Somayya, J*—If both agnates and cognates co-exist the agnates must certainly be consulted in preference to cognates. The observations of the Judicial Committee in *Balasubramanya Pandya Thalaivar* v. *Subbayya Thevar,* (1938) 1 M.L.J. 426: L.R. 65 I.A. 93: I.L.R. (1938) Mad. 551 (P.C.), that they "would not be prepared to hold on the authorities that the only kinsmen whose assent need be sought are the agnates" cannot be taken to be a definite pronouncement on the question.

The division bench is a final Court of appeal in an Indian High Court, unless the case is referred to a Full Bench and one Division Bench should regard itself bound by the decision of another Division Bench on a question of law. If a Division Bench does not accept as correct the decision on a question of law of another Division Bench, the only right and proper course to adopt is to refer the matter to a Full Bench.

Appeal against the decree of the Court of the Subordinate Judge of Guntur in A. S. No. 25 of 1935, preferred against the decree of the Court of the District Munsif of Guntur in O. S. No. 568 of 1930.

This appeal was referred to a Full Bench by *Abdur Rahman, J.*

V. Govindarajachari and *M. Harisarvothama Rao* for Appellant.

P. Satyanarayana Rao, V. Subramaniyam and *V. Satyanarayana* for Respondents.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—The question which the Court is called upon to decide in this appeal is whether an adoption by a Hindu widow is valid when the family is divided and she has obtained the consent of the nearest sagotra sapindas of her husband, but has not consulted a daughter's son, he being of age. In other words does the Hindu law demand that the daughter's son shall be consulted, if he is of age, before the widow can adopt, notwithstanding that the proposed adoption has received the approval of her husband's nearest agnates?

In this case one Kornepati Lakshminarayana died divided from his brothers. He was survived by his wife Subbamma and his two daughters, the appellant and one Rathamma, who is now dead. The appellant has four sons who have not been made parties to this litigation. Rathamma had two sons the

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fifth and sixth respondents. In the year 1916, about 40 years after her husband's death, Subbamma adopted a boy named Narasimha Rao, the son of the third respondent. Before the adoption took place Subbamma obtained the consent in writing of her husband's nearest agnates, the second, third and fourth respondents, who are the sons of her husband's brothers. The adopted boy died and Subbamma then adopted with the like consent the first respondent, the son of the second respondent. It is common ground that the adoption ceremony was duly performed and that the appellant's sons, all of whom were majors, were present. Subbamma died on the 23rd April, 1930, and after her death the appellant instituted in the Court of the District Munsif of Guntur the suit out of which this appeal arises for a declaration that the adoption was invalid and for possession of her father's estate. Various pleas were raised, but for the purposes of the appeal it may be taken that her only ground for challenging the adoption was, that one of her sister's sons, the sixth respondent, who was a major at the time of the adoption, was not consulted and that he had not intimated his consent to the adoption taking place. Why the appellant did not join her sons as parties to the suit is explained by the fact that they were present at the adoption ceremony and she was unable to contend that they were not consenting parties. The position then is this. The nearest sagotra sapindas gave their express consent to the adoption, the appellant's own sons impliedly gave their consent, but the major son of the appellant's sister was not consulted and did not signify his acquiescence. The Court has been given to understand that the other son of Rathamma was a minor at the time. The District Munsif held that the adoption was valid and on appeal the Subordinate Judge of Guntur concurred in his decision. The appellant then filed this second appeal which has been placed before a Full Bench for decision as there is a conflict of authority in this Court on the question whether it is necessary to consult a daughter's son when the widow of a member of a divided Hindu family adopts a son to her husband without authority to adopt having been given by her husband.

The position of a daughter's son under Hindu law is a special one. While he is not a sagotra sapinda, but a bandhu, he is given the right of succession to his maternal grandfather's estate after the death of his maternal grandmother and his

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mother when the maternal grandfather has left no son, grandson or great grandson through the male line. According to the Mitakshara law of succession the agnatic kindred are as a general rule preferred to all cognates, irrespective of proximity of relationship. In the absence of a direct descendant in the male line down to three degrees, the widow, however, inherits the estate, and after her, the daughter and the daughter's son. These three come in before all other agnates except the three descendants in the direct male line. The precedence of the widow is due to the theory that she is the surviving half of her deceased husband, and the daughter comes in next because she equally with the son proceeds from the limbs of the father. The special position of the daughter's son is based on ancient texts.

Vishnu says:

"In regard to the obsequies of ancestors, daughter's sons are considered son's sons,"

and Manu:

"Between a son's son and the son of a daughter there exists in this world no difference; for even the son of a daughter saves him (who has no sons) in the next world, like the son's son".

It is clear that the priority given to the widow, the daughter and the daughter's son over agnates not in the direct male line of descent can only be regarded as an exception to the general rule.

There is no textual authority bearing directly on the question raised in this appeal, at least none has been quoted to us, and in the course of the argument the Court has been given to understand that none exists. The question admittedly falls to be decided on the principles to be gathered from the decisions of the Privy Council relating to the widow's right to adopt under the Mitakshara law as applied in the Madras Presidency, but the question whether the daughter's son has the right to be consulted before the widow adopts a son to her deceased husband without authority from the husband has not been raised directly before the Judicial Committee. Four Division Benches of this Court have considered the judgments of the Privy Council in cases relating to the widow's right to adopt and there has been a marked divergence of opinion as to their effect in a case like the present one. In order that there may be some finality so far as this Court is concerned on the question of the meaning to be attached to the decisions of the Judicial Committee it is necessary that they should again be examined and that this Full Bench should decide their bearing in this connection.

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In *Collector of Madura* v. *Moottoo Ramalinga Sethupathy*[1], which is known as the Ramnad case, the Privy Council definitely laid down that according to the Mitakshara law as administered in the Madras Presidency a Hindu widow, not having her husband's authority to adopt, could lawfully adopt a son to him, if the adoption was authorised by the consent of his "kinsmen". With regard to the question, who are the kinsmen whose assent will supply the want of positive authority from the deceased husband, their Lordships in that case observed:—

"Where the husband's family is in the normal condition of a Hindu family, *i e*, undivided, that question is of comparatively easy solution. In such a case the widow, under the law of all the schools which admit this disputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to maintenance And though the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorise an adoption by her, yet, if there be no father, the consent of all the brothers, who, in default of adoption, would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will. Where, however, as in the present case, the widow has taken by inheritance the separate estate of her husband, there is greater difficulty in laying down a rule. The power to adopt when not actually given by the husband can only be exercised when a foundation for it is laid in the otherwise neglected observance of religious duty, as understood by Hindus. Their Lordships do not think there is any ground for saying, that the consent of every kinsman, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case, therefore, their Lordships think, that the consent of the father-in-law, to whom the law points as the natural guardian and "venerable protector" of the widow, would be sufficient. It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to show, that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive."

So far as the divided family is concerned it will be observed that the Board here held that:—(1) the assent of "kinsmen" is required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption; (2) the consent of the father-in-law, the "venerable protector" of the widow would be sufficient; (3) when the father-in-law is dead it is not easy to

1. (1868) 12 M.I.A. 397.

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lay down an inflexible rule; every such case must depend upon the circumstances of the family, and there should be such evidence of the assent of "kinsmen" as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. In the Ramnad case the nearest agnates were the mother-in-law of the widow and the natural brother of the adopted boy, and it was held that their consent was sufficient. No cognate was consulted. In all the decisions of the Privy Council bearing on this question, except one, there were agnates living. In the one exception there was no evidence as to what agnates were in existence, and so far as the main claimant was concerned the case turned, not on the consent of cognates, but whether there was an implied authority to adopt independently of any consent. I shall make further mention of this case later.

In *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*[1], the Judicial Committee made the following observations, which have an important bearing on the matter under discussion, notwithstanding that there the family was undivided:

"The Hindu wife upon her marriage passes into and becomes a member of that family. It is upon that family that, as a widow, she has her claim for maintenance. It is in that family that, in the strict contemplation of law, she ought to reside. It is in the members of that family that she must presumably find such councillors and protectors as the law makes requisite for her."

The daughter's son is not of the family. He is a member of his father's family and therefore clearly does not come within this statement. Their Lordships in this case also observed:—

"It may be the duty of a Court of Justice, administering the Hindu Law, to consider the religious duty of adopting a son as the essential foundation of the law of adoption, and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property, and, it may be, in the case of collateral succession, as in the present instance, the rights of parties in actual possession, dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over woman possessed of, or capable of exercising dominion over, property."

Here emphasis is placed on the necessity for advice in order to prevent the widow acting capriciously or from corrupt motives.

1. (1876) L.R. 3 I.A. 154 : I.L.R. 1 Mad. 69 (P.C.).

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In *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*[1], the Privy Council considered the passage in the *Ramnad case*[2] immediately following the statement that it was not easy to lay down an inflexible rule for the case in which no father-in-law was in existence and said:—

"Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow and that all which this Committee in the former case intended to lay down was, that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration, by what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband."

There is no reason to suppose that the word "family" was here used in a sense different from the strict sense in which it was used in the passage which I have quoted from the judgment in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*[3].

A Hindu widow having no authority to adopt cannot ignore the nearest sapindas. If she does and acts only with the consent of remote sapindas the adoption is invalid. This was the decision of the Privy Council in *Veera Basavaraju* v. *Balasurya Prasada Rao*[4]. The widow there adopted without the consent of the nearest agnates and the adoption was held to be invalid. The judgment of the Board was delivered by Mr. Ameer Ali, who said that the *Ramnad case*[2] established the proposition that under the Dravidian branch of the Mitakshara law, in the absence of authority from her deceased husband a widow may adopt with the assent of her "males agnates" (page 1004 of the report). At page 1009 Mr. Ameer Ali said:—

"The decision in the *Ramnad case* (*Collector of Madura* v. *Mootoo Ramalinga Sethupathy*[2]) was followed and explained in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*[1] which established the following proposition: That the requisite authority in the case of an undivided family is to be sought by the widow within that family; that it is in the members of that family that she must presumably find such counsellors and protectors as

1. (1876) L.R. 4 I.A. 1: I.L.R. 1 Mad. 174 (P.C.).
2. (1868) 12 M.I.A. 397.
3. (1876) L.R. 3 I.A. 154: I.L R. 1 Mad. 69 (P.C.).
4. (1918) 36 M.L.J. 40: L.R. 45 I.A. 265: I.L.R. 41 Mad. 998 (P.C.).

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the law makes requisite for her; and that she cannot at her will travel out of that undivided family and obtain the authorization required from separated and remote kinsmen of her husband. This being the position of a widow in an undivided family, what are the conditions imposed on her if her husband happens to die in a state of separation from his kindred? Division does not affect her personal dependence or give her an independent status to alter by her own authority the succession to the estate which she takes as the widow of her husband. She is still dependent for counsel and protection upon the nearest sapindas of her husband, who are the most closely united to him by ties of blood, or, to use the language of Hindu lawyers, by 'community of corporal particle''. The father of the deceased, if still alive, continues to be her 'natural guardian and venerable protector.' He has furthermore a direct interest in the protection of the estate, for in case of her death without leaving her surviving a daughter or the mother of her deceased husband, he has right to the reversion. His authorization is, therefore, essentially requisite to the validity of an adoption by her to her husband. If there is no father the divided brothers take his place by virtue of the tie of blood as her husband's nearest sapindas; they become her natural guardians and protectors of her interests. They also have an interest in the protection of the inheritance. In the absence, then, of the father, the assent of the divided brothers is equally requisite for the validity of the widow's adoption. If a majority assent and one refuses, his objection may be discounted. But the absence of their consent, or in case there is only one, of his consent, cannot be made good by the authorization of distant relatives remotely connected whose interest in the well-being of the widow or the spiritual welfare of the deceased, or in the protection of the estate, is of minute character, and whose assent is more likely to be influenced by improper motives."

We have here a reiteration of the principle stated in the *Ramnad case*[1] that the consent of the father-in-law, if still alive, is essential to a lawful adoption and the equally positive statement that in the absence of the father-in-law the consent of the divided brothers of the deceased husband is requisite. The daughter's son in the matter of succession excludes the deceased's father and his brothers, but this judgment clearly lays down that they come before all others when it is a question of advising the widow on a proposed adoption. In my opinion the judgment does not confine the priority to the father and the brothers. The words:

"She is still dependent for her counsel and protection upon the nearest sapindas of her husband, who are the most closely united to him by ties of blood, or, to use the language of Hindu lawyers, by 'community of corporal particles'"

indicate that the priority extends to all the agnates, the nearer, of course, excluding the more remote. But if there were any doubt it would be eliminated by the following statement at page 1011 of the report:

"The reasons which make the assent of divided brothers a requisite con-

1. (1868) 12 M.I,A. 397.

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dition apply *mutatis mutandis* to the case of the nearest sapindas other than brothers."

The word "sapindas" can only be read here as denoting agnates.

It is true that in *Veera Basavaraju* v. *Balasurya Prasada Rao*[1], it was said that the decisions in the *Ramnad case*[2] and in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*[3], show clearly that the rights to property cannot be left out of consideration in determining who should be consulted before a widow of a separated brother makes an adoption. But this statement was made in connection with the rule which was being laid down that in the absence of the father-in-law the brothers should be consulted. In the absence of a daughter's son they would be the nearest reversioners and their contingent right to the property was given as an additional reason why the brothers should be consulted. I am unable to read into the judgment in *Veera Basavaraju* v. *Balasurya Prasada Rao*[1] an indication that right to property is to be the governing factor; in fact when the authorities are considered as a whole it seems to me that the indication is all the other way.

In *Krishnayya* v. *Lakshmipathi*[4], Viscount Cave after reference to the *Ramnad case*[2] and to the case of *Veera Basavaraju* v. *Balasurya Prasada Rao*[1] said:—

"The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter. It must, however, be added that, save in exceptional cases such as those mentioned above (where the near agnate is a minor or lunatic or actuated by corrupt or malicious motives) the consent of the nearest sapindas must be asked, and if it is not asked it is no excuse to say that they would certainly have refused."

There could be nothing plainer than this statement. The nearest agnates who are capable of forming an intelligent and honest judgment have to be consulted in the matter of a proposed adoption by a widow. It will be observed that the word "sapindas" is used in this passage and that the context demands that it be read as meaning "agnates".

In *Sri Krishnayya Rao* v. *Surya Rao Bahadur Garu*[5], the

1. (1918) 36 M.L.J. 40 : L.R. 45 I.A. 265 : I.L R. 41 Mad. 998 (P.C.).
2. (1868) 12 M.I.A. 397.
3. (1876) L.R. 4 I A. 1 : I.L.R. 1 Mad. 174 (P C.).
4. (1920) 39 M.L.J. 70 : L R 47 I.A 99 : I.L R. 43 Mad. 650 (P.C.).
5. (1935) 69 M.L.J. 388 (P.C.).

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Privy Council observed:—

"The sapindas are to be regarded as a family council—*Vellanki* v. *Venkata Rama*[1], the natural guardians of the widow, and the protectors of her interests. In giving or withholding their consent, it is their duty, in this capacity, to form an honest and intelligent judgment on the advisability or otherwise of the proposed adoption in, and with reference to the widow's branch of the family. . . . . Their Lordships have no hesitation in holding that where a *sapinda* whose consent to an adoption is sought, is actuated by motives such as these (personal loss to himself and enmity), his dissent may be disregarded and they think it follows that if only the other *sapinda* in the same degree accords a *bona fide* consent, the adoption will be valid."

The judgment in *Krishnayya* v. *Lakshmipathi*[2], was referred to in this judgment and it is to be presumed that the word 'sapinda' was used in the same sense.

On behalf of the appellant great stress has been laid on a short passage in the judgment of the Privy Council in *Balasubramanya Pandya Thalaivar* v. *Subbayya Thevar*[3]. This is the one case in which there were no agnates living and the decision turned on the question whether there was implied authority to adopt, independently of consent by sapindas. The passage on which reliance is placed by the appellant is this:

"Their Lordships would not be prepared to hold on the authorities that the only kinsmen whose assent need be sought are the agnates."

It is said that this means that in using the words "kinsmen", "kindred", or "family council" the Privy Council must have had in mind both agnates and cognates. In view of the very definite statements in *Veera Basavaraju* v. *Balasurya Prasad Rao*[4] and *Krishnayya* v. *Lakshmipathi*[2], this argument cannot be accepted in respect of cases where there are agnates living. I consider that the statement in *Balasubramanya Pandya Thalaivar* v. *Subbayya Thevar*[3], can only be taken as an indication that in their Lordships' opinion consultation is still necessary when the only surviving relatives are cognates. No assent of 'kinsman' was alleged in that case, but it was contended that as there were no agnates in existence at the time of the adoption whose assent could be sought the widow had an inherent right to adopt of her own volition. An issue was raised as to this in the trial Court, but the contention was subsequently abandoned. It was not raised in the argument on appeal and was not referred to in the printed case, but the contention was sought to be revived before

1. (1876) L.R. 4 I.A. 1: I.L.R. 1 Mad. 174 (P C.).
2. (1920) 39 M.L.J. 70: L.R. 47 I A. '9: I.L.R. 43 Mad. 650 (P.C.).
3. (1938) 1 M.L.J. 426: L.R. 65 I.A. 93: I.L R. (1938) Mad. 551 (P.C.).
4. (1918) 36 M.L.J. 40: L.R. 45 I.A. 265: I.L.R. 41 Mad. 998 (P.C.)

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the Board. The argument was rejected and it was in this connection that their Lordships made the observation on which the appellant places so much stress.

In my opinion the judgments of the Privy Council are to be read as deciding that the widow of a divided brother, not having received from her husband authority to adopt a son to him, can only do so when she has received the consent of her father-in-law, if alive. If the father-in-law is dead she must receive the assent of her husband's brothers. If there are no brothers living, the nearest agnates are her proper advisers. If consent is improperly withheld she may nevertheless lawfully adopt with the consent of the next nearest agnates. If there are no agnates she must look for advice to the cognates, it having been definitely laid down that she is not competent in law to decide on an adoption for herself. The same rule of priority will naturally apply in the case of cognates. In view of the emphatic statement with regard to the position of the father-in-law in the *Ramnad case*[1], the equally emphatic statements in *Veera Basavaraju* v. *Balasurya Prasada Rao*[2], with regard to priority (first the father-in-law, then the brothers, and after them the nearest agnates) and the express mention of the nearest agnates in *Krishnayya* v. *Lakshmipathi*[3], I fail to see how any other construction can be reasonably placed on the judgments of the Board dealing with this question. And to read them in this sense accords with the Hindu idea of the family. The agnates are the only true members of the family according to the Hindu idea.

In adopting a son to her husband the widow is only acting in accordance with the tenets of her religion. The happiness of her husband's soul may depend on there being a son to carry out the religious duties imposed upon a son by the Hindu religion. In *Amarendra Man Singh* v. *Sanatan Singh*[4], the Judicial Committee referred to the well-established doctrine as to the religious efficacy of sonship and their Lordships felt that great caution should be observed in shutting the door upon any authorised adoption by the widow of a sonless man. The judgment in that case recognises the importance of an adoption

1. (1868) 12 M.I.A. 397.
2. (1918) 36 M.L.J. 40: L.R. 45 I.A. 265: I.L.R. 41 Mad. 998 (P.C).
3. (1920) 39 M.L.J. 70: L.R. 47 I.A. 99: I.L.R. 43 Mad. 650 (P.C.).
4. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.).

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from a spiritual point of view and indicates that the matter of succession to property is a secondary consideration. The only ground on which a daughter's son can really claim to be consulted is his interest in the property. He is not a member of the family and is only regarded as a sapinda for purposes of succession. He may if he cares to do so perform the religious duties which would fall upon the grandfather's descendants in the male line if there were such descendants, but admittedly there is no obligation upon him to perform them. If he neglects to carry out the ceremonies he commits no sin, but neglect in this respect by a son involves the commission of sin. The insistance on the widow seeking advice is based on her own incapacity to form a proper opinion for herself, and obviously the person least likely to give proper advice in such a matter is the son of her daughter who is a member of another family and will lose the whole estate if the adoption takes place. Moreover, he is likely to be a very young man, although he cannot be ruled out on this ground. While interest in the estate has been regarded as a factor in the choosing of advisers the judgments of the Privy Council show that it cannot be regarded as the governing factor. Sound advice to the widow is the most important consideration in the performance of an act which may be regarded as a religious duty, certainly an act which according to the Hindu religion will confer spiritual benefit on her deceased husband. The best advice is obviously to be expected from the dead husband's agnates, and it seems to me that the Privy Council has clearly indicated that if there are agnates, they and they alone, are the proper advisers of the widow. In the present case the widow received the consent of her husband's nearest agnates and I hold that the fact that the major son of Rathamma did not consent does not invalidate the adoption.

The conclusion that the daughter's son is not entitled to be consulted is the conclusion which Oldfield and Phillips, JJ., arrived at in *Viswasundara Rao* v. *Somasundara Rao*[1], by Jackson, J., in *Anne Brahmayya* v. *Chelasani Rattayya*[2] and by Madhavan Nair and Jackson, JJ., in *Murahari Brahma Sastri* v. *Sumitramma*[3] and I may add that the same opinion is expressed in Mayne, 10th Edition, pages 223-5. In *Anne Brahmayya* v. *Chelasami Rattayya*[2], Ramesam, J., who formed the

1. (1920) I.L.R. 43 Mad. 876. 2. (1924) 20 L.W. 503.
3. (1933) 66 M.L.J. 577: I.L.R. 57 Mad. 411.

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Division Bench with Jackson, J., held that the widow was bound to consult the daughter's son and Spencer and Venkatasubba Rao, JJ., agreed with him in *Kesar Singh* v. *Secretary of State for India*[1]. Ramesam, J., considered that there was nothing in the decisions of the Privy Council to show that cognates were not included in the rule with regard to the consultation of kinsmen and said that the word "sapindas" whatever its meaning in the *Smritis* may be, can include agnates as well as cognates, referring in this connection to the judgment of the Judicial Committee in *Ramachandra Martanda Waiker* v. *Vinayak Venkatesh Kothekar*.[2] The question does not depend on whether the word "sapindas" may or may not be taken to include agnates as well as cognates speaking generally, but on the principles to be gathered from the judgments of the Privy Council and as I have indicated I can see no reason whatever for supposing that the Judicial Committee ever intended to lay down that cognates shall be consulted when there are agnates alive. In *Kesar Singh* v. *Secretary of State for India*[1], Spencer, J., observed that agnates should as a rule be consulted first, if there are agnates, because the principal agnates are the nearest kinsmen but he saw no authority for limiting the class of *gnatis* and sapindas to agnates except the judgment of Oldfield and Phillips, JJ., in *Viswasundara Rao* v. *Somasundara Rao*.[3] Venkatasubba Rao, J., expressed the opinion that if the judgments of the Privy Council did not embrace cognates as well as agnates a widow could not adopt if there were no surviving agnates, but he did not consider whether the judgments might be taken to apply to agnates in the first place and to indicate that cognates should be consulted in the absence of agnates. I have sufficiently indicated my opinion of the effect of the rulings of the Privy Council and it follows that I consider the judgments of Ramesam, Spencer and Venkatasubba Rao, JJ., are erroneous and ought not to be followed.

It is a great pity that this question was not referred to a Full Bench for decision when the question was raised for the second time in *Anne Brahmayya* v. *Chelasami Rattayya*[4]. While a Judge of the High Court sitting alone is not

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1. (1926) 51 M.L.J. 16: I.L R. 49 Mad. 652.
2. (1914) 27 M.L.J. 333: L.R. 41 I.A. 290: I.L.R. 42 Cal. 334 (P.C.).
3. (1920) I.L.R. 43 Mad. 876. 4. (1924) 20 L.W. 503.

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bound on a question of law by the decision of another Judge sitting alone this principle goes no further. The Division Bench is the final Court of Appeal in an Indian High Court, unless the case is referred to a Full Bench, and one Division Bench should regard itself bound by the decision of another Division Bench on a question of law. In England where there is the Court of Appeal, Divisional Courts follow the decisions of other Divisional Courts on the grounds of judicial comity. (See *The Vera Cruz (No. 2)*[1], *Harrison* v. *Ridgway*[2], *Ratkinsky* v. *Jacobs*[3] and *Phillips* v. *Copping*[4].). If a Division Bench does not accept as correct the decision on a question of law of another Division Bench the only right and proper course to adopt is to refer the matter to a Full Bench, for which the Rules of this Court provide. If this course is not adopted the Courts subordinate to the Court are left without guidance. Apart from the impropriety of an appellate Bench refusing to regard itself bound by a previous decision on a question of law of an appellate Bench of equal strength and the difficulty placed in the way of Subordinate Courts administering justice, there are the additional factors of the loss of money and the waste of judicial time. There must have been a considerable waste of money and judicial time as the result of the question under discussion not having been referred to a Full Bench when the correctness of the decision in *Viswasundara Rao* v. *Somasundara Rao*[5] was first questioned.

For the reasons given I consider the decisions of the Courts below in this case were right. Consequently I would dismiss the appeal with costs and fix the advocates fee at Rs. 200.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar J.—I concur in the conclusion reached by my Lord, which appears to my mind to interpret the decisions of the Privy Council more in accordance with the spirit of the Hindu Law, than the opinions of some of the learned Judges who have had to consider the point in the past. I am unable to find in the pronouncements of their Lordships a sufficient basis for assigning to the daughter's son a position of superiority over the agnatic kindred in the matter of consultation. Considerations of proximity of religious merit, or of the proprietary interest of the persons to be consulted, have no

1. (1884) 9 P.D. 96.
2. (1925) 133 L.T. 238.
3. (1929) 1 K.B. 24.
4. (1935) 1 K.B. 15.
5. (1920) I.L.R. 43 Mad. 876.

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doubt been mentioned. But it will be found on scrutiny that such considerations were adverted to more by way of additional support for the recognized position of the agnatic group, than as furnishing in themselves independent criteria in making the choice.

Somayya, J.—I agree with the judgment which has just been pronounced by my Lord the Chief Justice but having regard to the importance of the question I wish to add a few words.

When a Hindu dies leaving a widow, divided agnates and daughter's sons, and his widow desires to make an adoption is it enough if she gets the consent of the divided agnates or is she bound to consult the daughter's sons as well ?

In this case Subbamma the widow of Lakshmi Narayana the last male holder obtained the consent of her husband's divided brother's sons under Ex. G and adopted the first defendant who is the son of the second defendant. The second, third and fourth defendants are the husband's nephews who gave the consent under Ex. G. Subbamma did not consult at least one of her daughter's sons. The question is whether the adoption is valid.

The question has to be decided on a few texts of Hindu Law and on judicial decisions. Under the Hindu Law an adoption is always made to the husband. While the husband is alive he alone can adopt a son. He may associate his wife or one of his wives if he has more than one wife in the act of adoption; but he need not associate any one of them and can make the adoption by himself.

The wife's capacity to make an adoption is based on the fact that adoption is an act which confers great spiritual benefit on her husband. But when can she make an adoption?

The text of Vasishta which is often quoted is—

> "Nor let a woman give or accept a son unless with the assent of her lord".

This text is accepted by the various commentators but has been interpreted by them in different ways. One extreme view which has prevailed in the Mithila School is that,

> "This consent of the husband must be given at the time of the adoption itself"

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so that, no adoption is possible after the husband's death. Thus no adoption by a widow is possible under the Mithila School of Law. The other extreme view is that which prevails in Bombay where it is held that adoption being an act conferring great spiritual benefit on the husband, his consent is presumed in the absence of a prohibition by him and a widow can therefore adopt except where the husband has prohibited it.

Between these two extreme views there are other views propounded by other schools of Hindu Law. The Dayabhaga school of law of Bengal holds that if the husband gives the authority to his wife to make an adoption to him, the authority may be exercised after his death. But if there is no such authority given by the husband during his lifetime, his widow cannot adopt. The Benares School of Law agrees with the Bengal view. Yet another view has been advanced and accepted in the Dravida country that even where the husband did not give the requisite authority, his widow can make an adoption with the consent of the husband's sapindas. The presumed incapacity of women to act independently is said to be the reason why she cannot make an adoption except with the husband's authority or his sapindas' consent.

The text which is generally relied on in this connection is that of Yagnavalkya, Ch. I, pl. 85:

रक्षेत् कन्यां पिता विन्नां पतिः पुत्रास्तु वार्धके ।
अभावे ज्ञातयस्तेषां स्वातन्त्र्यं न क्वचित् स्त्रियाः ॥

"Let her father protect a maiden; her lord a married woman; sons in oldage; if none of these other *gnaties*. She is not fit for independence."

This supposed want of independence of a woman to act for herself is said to be cured by the consent of her husband's ज्ञातयः *'gnathayaha.'*

This expression ज्ञातयः in ordinary parlance is certainly confined to agnatic sapindas. But it is said that it may also include cognates as well, that is, sapindas in general.

The Smrithis and the Commentaries do not contain any indication as to who is to be consulted by a widow in the absence of the authority of the husband. But in Strange's Hindu Law there are set out a number of cases decided by this Court in which the widow's power of making an adoption with the consent of sapindas was upheld.

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The matter came up in the Ramnad case, *The Collector of Madura* v. *Moottoo Ramalinga Sethupathy*[1], before the Judicial Committee. After referring to Strange and Colebrooke their Lordships recognised the power of a Hindu widow to adopt a son with the husband's kinsmen's consent. In later cases the Judicial Committee expressed the same view in different language.

The question now before us has to be decided mainly on the judicial decisions. In a case of this kind we have primarily to see what the Judicial Committee has laid down in the several cases which went up for decision.

In the *Ramnad case*[1], there was a very distant agnate of the husband, and the mother of the husband. The widow adopted with the consent of both. The Judicial Committee held that the adoption was valid. The reference to the consent of the mother-in-law may be left out because it is on account of the presumed incapacity of a woman to act independently that the advice of the sapindas is enjoined on a widow. A person who is herself under an incapacity to act independently cannot supply the requisite advice or authority to another incapacitated person. It is conceded before us that female sapindas need not be consulted. In this very case the plaintiff, the daughter was not consulted and the adoption is not attacked on that ground.

Then comes the question as to who among the husband's sapindas are entitled to be consulted and whose authority it is that has to be obtained by a widow desirous of making an adoption.

Adoption introduces a stranger into the husband's family and *prima facie* it is the members of that family that have to decide on the advisability of introduction of a stranger into that family.

The Privy Council observe in the Ramnad case (*The Collector of Madura* v. *Moottoo Ramalinga Sethupathy*[1]), as follows:

> "The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption."

Then they say at page 443 that the Courts in India rightly found the members to be consulted in the Tevar's family and

1. (1868) 12 M.I.A. 397 at 442.

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refer to the printed pedigree which is in fact a pedigree of his agnatic sapindas.

In *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*[1], the Judicial Committee laid down that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration, by what may be called the family council of the expediency of substituting an heir by adoption to the deceased husband.

Taking these two cases, it is clear that the 'family' spoken of is the husband's family and it is his kinsmen, that is, the members of his family that are referred to in the above decisions.

So far, there is no indication that a daughter's son who is not a member of his family is a person who should be consulted by the widow. Then the next question is whether all the sapindas are to be consulted if not who among them are to be consulted and in what order. This question was answered in three decisions of the Judicial Committee, *Jonnalagadda Venkamma* v. *Jonnalagadda Subramanyam*[2], *Veera Basavaraju* v. *Balasurya Prasada Rao*[3] and *Krishnayya* v. *Lakshmipathi*[4]. It is clear from these decisions (1) that it is enough if she obtains the consent of the nearest sapindas and that if she gets their consent, she need not go further and seek the consent of the remoter sapindas; (2) that she is bound to consult all the nearest sapindas and failure to consult even one of them will be fatal; (3) that even if it be certain that the nearest sapindas would refuse to give their assent, still she is bound to consult them. In dealing with this question, the Judicial Committee has used in *Veera Basavaraju* v. *Balasurya Prasada Rao*[3], language which is relied on by Mr. V. Govindarajachari, in support of his case. In that case, the nearest sapinda was not consulted at all; and the widow obtained the consent of the remoter sapindas and made the adoption. The Judicial Committee held that the adoption was invalid. Several passages on pages 1010 and 1011 were relied on by Mr. V. Govindarajachari as supporting

1. (1876) L.R. 4 I.A. 1 : 1 Mad. 174 (P.C.).
2. (1906) 17 M.L.J. 114: L.R. 34 I.A. 22: I.L.R. 30 Mad. 50 (P.C.).
3. (1918) 36 M.L.J. 40: L.R. 45 I.A. 265: I.L.R. 41 Mad. 998 (P.C.).
4. (1920) 39 M.L.J. 70: L.R. 47 I.A. 99: I.L.R. 43 Mad. 650 (P.C.).

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his contention. His contention is that in this case the Judicial Committee definitely laid down three tests: (1) who confers greater spiritual benefit on the deceased; (2) who is more closely related to the deceased according to the Mitakshara theory of propinquity; and (3) who is the person whose proprietary rights are affected by the adoption. Mr. V. Govindarajachari urges that the Judicial Committee approved the opinion of Golapchander Sirkar Sastri extracted on page 1011 of the report while referring to the analogy of the sapinda whose consent will validate an alienation by the widow. He urges further that whatever test is applied, the daughter's son comes first and that the brother's sons of the deceased come after the daughter's son. For the first test, he refers to Dharma Sindhu and Nirnaya Sindhu which give preference to the daughter's son in the performance of funeral ceremonies. For the second, he relies on the fact that the daughter's son is treated by the Mitakshara School of Law as being more closely related to the deceased than the brother's sons according to the doctrine of propinquity. As for the third, he relies on the fact that the daughter's son succeeds in preference to a brother's son and where the two co-exist it is the daughter's son whose proprietary rights are affected.

The second and third points go together. The preferential right of the daughter's son is based upon specific texts of Manu and Vishnu. The preference given to the daughter's son is to be traced to the practice of an appointed daughter in which case her son was considered to be in all respects equal to that of a son's son. Though this practice had become obsolete even by the time of Manu, the texts which give the preferential right to the daughter's son in general is traceable to the theory of the appointed daughter's son. When one daughter was not treated with a preferential right sons of all daughters came to be regarded alike, but the position that was given to the appointed daughter's son in the scheme of succession is maintained and the Smrithi writers embodied in their Smrithis, special texts giving the daughter's son in general a preferential right and making him inherit next after the widow and the daughter and before the father and the mother. (*See* Manu, Chapter IX, pl. 127 to 136. Vishnu, Chapter XV, pl. 46.) As for the first ground urged it is not clear that in fact on the true principle of Hindu Law relating to the efficacy of the funeral oblations, the

daughter's son is in any way superior to a brother's son. (*See* Sarvadhikari, Law of Inheritance, Second Edition, pages 662 and 663). He sums up the position thus on page 663 as to performance of parvana sradha:

"In the case of maternal ancestors, the daughter's son should also celebrate these rites as an act of moral obligation although not legally bound to do so."

He also points out that it is legally obligatory on a person to perform these rites as regards his *paternal ancestors*. Thus a brother's son is legally bound to offer pindas at parvana sradha to the deceased's father and grandfather to whom the deceased also was offering pindas. But a daughter's son is not legally bound to offer any pindas to his maternal ancestors. Further, what a daughter's son offers are termed secondary pindas, whereas the pindas offered by agnates are called primary pindas and the latter are supposed to be superior to the former.

After all what has to be decided is whether an adoption was proper in the circumstances of any given case. As pointed out by the Judicial Committee, she is not to make an adoption with a view to spite this or that sapinda but on the expediency of substituting an heir by adoption to the deceased husband. In this task the Courts do not take upon themselves the duty of finding out whether in any particular case it is expedient and proper to introduce an heir by adoption to the husband. This duty is cast upon the widow's advisers and natural protectors. As an adoption introduces a new member into the husband's family, it is the members of that family that have to be approached by the widow to get the necessary consent. The right is the peculiar right of the members of that family. It is their right to judge whether a new member by adoption should be introduced into this family. As the Judicial Committee said in *The Collector of Madura* v. *Moottoo Ramalinga Sethupathy*[1], the Courts in India rightly found the members to be consulted in the Tevar family, that is, his own agnatic family. In the decision in *Veera Basavaraju* v. *Balasuryaprasada Rao*[2], the observations at p. 1009 are decidedly in favour of the view that the father and the brothers at any rate are entitled to be consulted in every case. As expressly laid down there, the father-in-law when alive is entitled to be consulted as the head of the family and as the venerable pro-

1. (1868) 12 M.I.A. 397 at 443.
2. (1918) 36 M.L.J. 40: L.R. 45 I.A. 265: I L.R. 41 Mad. 998 (P.C.).

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tector and in his absence, the brothers are said to take his place and they are entitled to be consulted.

Stopping here, if the view that is propounded by Mr. Govindarajachari for the appellant is correct, then the brothers at any rate are postponed to a daughter's son in the matter of consultation. Mr. Govindarajachari states that the father stands on a peculiar footing but he would ascribe it to a special text of Vidyaranya Swami extracted in the judgment of the Judicial Committee in the Ramnad case, *The Collector of Madura* v. *Moottoo Ramalinga Sethupathy*[1]. Mr. Govindarajachari says that it is on account of the special text that the father of the deceased or the father-in-law of the adopting widow is given that peculiar position and he argues that even the brothers are not entitled to be consulted in preference to a daughter's son. But the passage in *Veerabasavaraju* v. *Balasurya Prasada Rao*[2], leaves no room for doubt that in the absence of the father, the brother is placed in the same position which the father occupied. The Judicial Committee says that the brothers are as much interested in the protection of the inheritance and in the spiritual welfare of the deceased as the father-in-law was and the two are placed in the same position so far as this matter is concerned. If therefore we read the passage at p. 1009 of the above report, it is clear that the Judicial Committee treats the father and the brothers as standing on the same footing. When the father is alive, he is to be consulted and when he is dead the brothers are entitled to be consulted. Their consent is an essential requisite and it is enough if their consent is got. The passages occurring in pages 1010 and 1011 are therefore to be understood as dealing with practical rules to be applied as to who, among the various agnatic sapindas, are to be consulted and in what order. So understood the passages at pages 1010 and 1011 become easy of application among the agnatic sapindas. Those who are nearer in degree, those who offer greater spiritual benefit, those who would succeed in preference to others, are the persons entitled to be consulted first. Indeed, if they are not consulted, the mere fact that she gets the consent of a larger number of remoter sapindas does not cure the defect. Further Mr. Ameer Ali who delivered the judgment of the Board in *Veera Basavaraju* v. *Balasurya Prasada*

1. (1868) 12 M.I.A. 397 at 443.
2. (1918) 36 M.L.J. 40: L.R. 45 I A. 265: I.L.R. 41 Mad. 998 at 1008, 1009 (P.C.)

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Rao,[1] refers at page 1004 to the decision in the *Ramnad case* as having laid down that a widow may adopt with the consent of *male agnates.* Whatever doubts there might have been if the judgment in *Veera Basavaraju* v. *Balasurya Prasada Rao*[1], stood alone, the later pronouncement of the Judicial Committee in *Krishnayya* v. *Lakshmipathy*[2], leaves no room for doubt that throughout, it is the agnatic sapindas that are referred to in all these decisions. In *Krishnayya* v. *Lakshmipathy*[2], the Judicial Committee referred to the Ramnad case, *The Collector of Madura* v. *Moottoo Ramalinga Sethupathy*[3], and to the case of *Veera Basavaraju* v. *Balasurya Prasada Rao*[1], and then said as follows:—

"The consent required is that of a substantial majority of those *agnates* nearest in relationship who are capable of forming an intelligent and honest judgment on the matter. It must however be added that save in exceptional cases such as those mentioned above (where the nearer *agnate* is a minor or a lunatic or actuated by corrupt and malicious motives) the consent of the nearer sapindas must be asked and if it is not asked it is no excuse to say that they would certainly have refused."

Coming after the decision *Veera Basavaraju* v. *Balasurya Prasada Rao*,[1] and that within two years of that decision, the above passage leaves no room for doubt that it is the agnatic sapindas who are nearest in degree and who are capable of forming an honest opinion on the question of the expediency of introducing an adopted son that are entitled to be consulted.

We are now not concerned with the question whether in the absence of agnates the widow might adopt with the consent of cognates. If both agnates and cognates co-exist the agnates must certainly be consulted in preference to cognates. In *Kesar Singh* v. *The Secretary of State for India*[4], Mr. Spencer lays down the rule that when both cognates and agnates exist, the agnates are entitled to preference in the matter of consultation. It is not necessary to say much about the observations of the Judicial Committee in the recent *Uthumalai case*, *Balasubramanya Pandya Thalaivar* v. *Subbayya Thevar*[5]. As pointed out in the judgment of my Lord just delivered the question did not arise for decision. The point had been mooted in the trial

1. (1918) 36 M.L.J. 40: L.R. 45 I.A. 265: I.L.R. 41 Mad 998 (P.C).
2. (1920) 39 M.L.J. 70: L.R. 47 I.A. 99: I.L.R. 43 Mad. 650 (P.C.).
3. (1868) 12 M.I.A. 397.
4. (1926) 51 M.L.J. 16: I.L.R. 49 Mad. 652.
5. (1938) 1 M.L.J. 426: L.R. 65 I.A. 93: I.L.R. (1938) Mad. 551 (P.C.).

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Court but had been given up in the trial Court. This was not urged in the High Court or in the printed case before the Judicial Committee. The Judicial Committee was not prepared under the circumstances to allow the appellant to raise that question at all. Having said so there is the observation relied upon by Mr. Govindarajachari. This cannot be taken to be a definite pronouncement on the question. At any rate it does not deal with the question which we have now to decide.

I therefore concur in the opinion pronounced by my Lord the learned Chief Justice.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE LAKSHMANA RAO.

Pakkiri Muhammad Tharaganar.. *Appellant* (Petitioner-21st Defendant)*

v.

U. T. Syed Sahib .. *Respondent (Respondent-Plaintiff).*

Pakkiri Muhammad Tharaganar v. Syed Sahib.

Madras Agriculturists Relief Act (IV of 1938), S. 19—Orders passed before new rules when execution petition pending—If come under Civil Procedure Code, S. 47.

In an appeal before the coming into force of the new rules,

Held, orders under S. 19 of Madras Act IV of 1938 cannot be deemed to be orders under S 47, Civil Procedure Code even when execution petitions are pending. The application under S. 19 has to be made to the Court which passed the decree. It is not a matter relating to the execution of the decree in any sense. If decree is scaled down an appeal will lie from the new decree, but if the application is dismissed no appeal can lie.

Jami Venkatappadu v. *Kannepalli Ramamurti*, (1939) 2 M.L.J. 853 held to be *obiter dictum* and not followed.

Subbaraidu, In re, (1939) 2 M.L.J. 609 (1), referred to.

Appeal against the order of the Court of the Subordinate Judge of Tinnevelly dated 30th September, 1938 in E. A. No. 289 of 1938 in O. S. No. 64 of 1933.

R. S. Srinivasacharya and *K. V. Rajagopalan* for Appellant.

S. Ramaswami Aiyar for Respondent.

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* A.A.O. No. 588 of 1938. 7th February, 1940.

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The Court delivered the following

JUDGMENT.—Mr. S. Ramaswami Aiyar for the respondent raises a preliminary objection that no appeal lies in this case. It is true that in the Madras Agriculturists Relief Act no appeal has been provided from orders passed under S. 19. Subsequently (in October, 1939) the Government have issued Rules providing for appeals in such cases, but those Rules have no retrospective effect (*Chidambaram Chettiar* v. *Muthukumaraswami Chettiar*[1]) and therefore those rules do not help the appellant. It has been held (vide *Subbaraidu*, In re[3]) that no appeal lies from an order under S. 19 dismissing the application of a judgment-debtor when no execution petition is pending in any Court. We are asked to say that it follows from this decision that if an execution petition is pending an appeal will lie, but the fallacy involved in that contention is obvious. We have been referred to the decision in C. R. P. No. 224 etc. of 1939 reported in *Jami Venkatappadu* v. *Kannepalli Ramamurti*[2], where it has been observed (at page 856) that all the petitions in that case:

"Must be deemed to be petitions which raise questions relating to execution, discharge or satisfaction of the decree and therefore come within the matters covered by S. 47 of the Code of Civil Procedure."

That observation is however merely an *obiter dictum* since the learned Judges in that case were dealing with revision petitions which were in the end allowed. If the orders were passed on matters arising under S. 47, Civil Procedure Code, appeals would lie and revision would be inadmissible.

We think Mr. Ramaswami Aiyar is right in contending that orders under S. 19 of the Act cannot be deemed to be orders under S. 47, Civil Procedure Code. The application under S. 19 of the Act is to be made to the Court which passed the decree, not to the Court which is executing the decree. In this view the fact that an execution petition is pending makes no difference, not does it make any difference that the executing Court happens to be the Court which passed the decree. The application under S. 19 has to be made to the Court which passed the decree and it is not a matter relating to the execution of the decree in any sense. If the decree is scaled down, an appeal will lie from the new decree, but if the application is dismissed, no appeal can lie. This appeal is accordingly dismissed with costs.

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1. (1940) 1 M.L.J. 317.
2. (1939) 2 M.L.J. 609 (1).
3. (1939) 2 M.L.J. 853.

Pakkiri Muhammad Tharaganar v. Syed Sahib.

We have been asked to allow this appeal to be converted into a Civil Revision Petition but we think there is no question of jurisdiction here. The learned sub-Judge has exercised his jurisdiction and has decided that this debt is not one in respect of which relief can be granted. We decline to allow conversion.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE MOCKETT.

A. R. Krishnaswami Aiyar and another .. *Appellants** (*Defendants 1 and 2*).

v.

The Travancore National Bank, Ltd., represented by Messrs. J. V. Pirrie and C. Gill, Provincial Official Liquidators and another .. *Respondents* (*Plaintiffs*).

Krishnaswami Aiyar v. Travancore National Bank, Ltd.

Principal and surety—Composition by principal debtor—If implied discharge of surety—Express contract by surety to be liable notwithstanding composition—Effect—Banker—If bound to disclose state of account of a constituent to his surety—Contract Act, S. 143—If applicable.

A surety bond provided that any contract between the borrower and lender by which the lender makes a composition with or promises to give time or not to sue the borrower will not discharge the surety or sureties. In a suit against the sureties after the principal debtor had entered into a composition with the lender,

Held, as the surety had expressly contracted to remain liable notwithstanding the discharge of the principal, it cannot now be contended that the discharge of the principal is an implied discharge of the surety.

Cowper v. *Smith,* (1838) 4 M. & W. 519: 150 E.R. 1534 and *The Union Bank of Manchester* v. *Beech,* (1865) 3 H. & C. 672: 159 E.R 695, followed.

There is no general legal obligation on the part of a bank to volunteer to a surety particulars of one of its constituent's indebtedness for this is a matter on which the surety has to inform himself.

Imperial Bank of India v. *Avanasi Chettiar,* (1929) 59 M L. J. 513: I.L.R. 53 Mad. 826 followed.

S. 43 of the Contract Act is not applicable to the case as mere non-disclosure as distinguished from intentional concealment cannot amount to 'keeping silence' under S. 143.

Appeal against the decree of the Court of the City Civil Judge, Madras, dated 22nd March, 1938 and passed in O. S. No. 325 of 1936.

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*C. C. C. A. No. 65 of 1938. 7th December, 1939.

Krishna-swami Aiyar v. Travancore National Bank, Ltd.
—
Mockett, J.

S. Athmanathan for Appellants.

John and *Row* for Respondents.

The judgment of the Court was delivered by

Mockett, J.—This is an appeal by the defendants in a suit filed against them in the City Civil Court by the plaintiffs the Travancore National Bank, Ltd. The cause of action is very simple. It is on a surety bond Ex. I by which the defendants made themselves liable to pay to the plaintiffs the amount due from one K. E. Sodawalla. Under Ex. I it will be seen that Sodawalla had been declared the successful bidder at the auction chit on the 9th February, 1935, and that he was paid a sum of Rs. 3,145. The evidence on behalf of the bank was as given by P. W. 1 that they refused to pay that amount unless, as was their custom, sureties were furnished by the successful bidder of the chit fund. Two such sureties were forthcoming and they are now defendants 1 and 2 in this case. They signed a very formidable document Ex. I from which it will be seen that they made themselves liable in as comprehensive terms as possibly could proceed from the draftsman's pen. The term with which we are immediately concerned is contained in cl. 9 in which it is said:

"it is further agreed that any contract between the borrower and the lender by which the lender makes a composition with or promises to give time or not to sue the borrower will not discharge the surety or sureties."

In fact under Ex. II the creditors of Sodawalla including the Travancore National Bank the plaintiffs in an Insolvency Petition No. 541 of 1935 (High Court, Madras) agreed to accept a sum of 4 annas in the rupee in full satisfaction of their claims; so that there was as envisaged by cl. 9 a composition. The suit was laid for the whole of the amount due under the bond but it was rightly held in the lower Court that a decree could only be given for the amount less the amount received by the bank under the Composition Ex. II.

It has been argued before us that this composition bond extinguishes the debt to the principal debtor and therefore there is no debt for which the sureties can be made liable. These very arguments have been put before the Courts in cases where the document was as identical with the document before us as it is possible for it to be with regard to its terms. In *Cowper v. Smith*[1], a document such as this was considered and the same

1. (1838) 4 M. & W. 519: 150 E.R. 1534.

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arguments as will be seen from the report were put before the Court. Lord Abinger, C.B., stated that the deed entered into by the debtor was a composition deed and was within the express terms of the guarantee. It authorised the plaintiffs to compound with their debtor. Accordingly as the surety had expressly contracted to remain liable, notwithstanding the discharge of the principal, it cannot now be contended that the discharge of the principal is an implied discharge of the surety. And with that the other learned Judges concurred. In a further decision in *The Union Bank of Manchester* v. *Beech*[1], where *Cowper* v. *Smith*[2], was considered, Pollock, C.B., disposed of an argument which has also been put before us in this case. He holds that the only distinction between the case of *Cowper* v. *Smith*[2], and the case before the Bench was that in the case then under consideration there was an absolute release but that in *Cowper's case*[2] although there was not in terms a release there was what substantially amounted to the same thing. The learned Judge continues:

"Under a composition, a part is taken in satisfaction of the whole. Money accepted as a part of a debt is not a composition, but a part payment. Where there is a release, the creditor in effect says to the debtor, 'I release you from your debt'; whereas, if there is a composition only, the creditor in effect says, 'I agree to accept a portion of your debt in satisfaction and discharge of the whole.' The difference, however, is merely technical, and in substance they are the same thing."

It will be seen therefore that the construction of Ex. I has virtually been dealt with by authority which we are content to follow.

The next point argued before us was that there was a duty on the bank to disclose Sodawalla's overdraft liability at the time the surety was taken. This point was made under two headings first on the general liability of the bank under such circumstances and secondly a special liability in this case because it was alleged by the witnesses for the defence that in answer to questions by the defence as to the financial position of Sodawalla the bank representative P. W. 1 Mr. Kuruvilla assured the first defendant that Sodawalla's financial position was beyond reproach. It is said by D. W. 2 that Mr. Kuruvilla stated:

"His account is one of the best. You need not be anxious. Only the rules require two signatures."

1. (1865) 3 H. & C. 672: 159 E.R. 695.
2. (1838) 4 M. & W. 519: 150 E.R. 1534.

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With regard to the first aspect the contention of the defendants is clearly negatived by the decision of a Bench of this High Court reported in *Imperial Bank of India* v. *Avanasi Chettiar*[1], where it is laid down that there is no general legal obligation on the part of a bank to volunteer to a surety particulars of one of its constituent's indebtedness, for this is a matter on which the surety has to inform himself. S. 143 of the Contract Act on which the defendants rely is as follows:—

"Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid."

This section has been considered and the High Court of Bombay in a judgment delivered by Sargent, C. J., in *Balakrishna V. N. Kirtikar* v. *The Bank of Bengal*[2], took the view that the expression "keeping silence" in that section clearly implied intentional concealment as distinguished from mere non-disclosure which no doubt was a fatal objection in insurance policies. We agree with that view. In this particular case the facts are very simple. The bank called upon its customer to furnish surety with regard to the payment made under a chit fund. We see no reason to distinguish a payment under a chit fund from any other obligation and under these circumstances surely it will be for the surety to interrogate the debtor. We agree that there is nothing in the authorities to suggest under such circumstances that the bank is compelled to break the confidence of its constituents and disclose its affairs to the surety. With regard to the second aspect the learned Judge has disbelieved the evidence of the defendants. He is not prepared to accept the story that by fraudulent misrepresentation they were induced to enter into the surety bond and we see no reason to differ from that view.

The result of our conclusion is that this appeal must be dismissed with costs.

K. S. *Appeal dismissed.*

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1. (1929) 59 M.L.J. 513: I.L.R. 53 Mad. 826.
2. (1891) I.L.R. 15 Bom. 585.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR JUSTICE PANDRANG ROW AND MR. JUSTICE HORWILL.

Boya Lingadu *alias* Dubbodu .. *Accused*.*

Boya Lingadu, *In re*.

Trial by jury—Unanimous verdict -Production of stolen property—Evidence of witness—Jury competent to form opinion as to reliability of witnesses.

The jury are entitled to form and express their own opinion as regards the reliability of witnesses, and one cannot exclude the possibility that they may have formed an adverse opinion on account of the demeanour of the witnesses or some other cause which does not find any mention in the record. It can hardly be urged that the jury is not competent to decide the simple question whether the evidence regarding the production of the properties stolen by the accused is reliable or not, and the mere fact that the opinion is one with which the Sessions Judge does not agree, does not make the jury's opinion a perverse or an unreasonable one.

Reference under S. 307 of the Code of Criminal Procedure, 1898, by the Sessions Judge of the Anantapur Division in Case No. 28 of his Calendar for 1939.

Accused not represented.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—This is a reference made by the Sessions Judge of Anantapur in respect of a verdict of not guilty returned by the jury on a charge of theft and in the alternative of retention of stolen property knowing it to be stolen. The case was a very simple one. The only evidence incriminating the accused was that certain articles were produced by the accused before the Police Officer, who investigated the case, and another witness. The ownership of the articles was proved by the persons in whose houses the thefts had taken place. The suggestion in the cross-examination of the Police Officer was that the articles said to have been produced by the accused were really handed over to the Police by the complainants themselves, and it is possible that the jury thought there was some truth in this suggestion. The jury's verdict was unanimous, and it cannot be said that simply because there is no reason to be found in the record for disbelieving the evidence of these two witnesses the jury's verdict must be regarded as perverse or unreasonable. The jury were entitled to form and express their own opinion as regards the reliability of these two

* Reference No. 6 of 1939. 3rd January, 1940.

Boya Lingadu, *In re.* — Pandrang Row, J.

witnesses, and one cannot exclude the possibility that they might have formed an adverse opinion on account of the demeanour of the witnesses or some other cause which does not find any mention in the record. It can hardly be urged that the jury was not competent to decide the simple question whether the evidence regarding the production of these properties by the accused was reliable or not, and the mere fact that the opinion is one with which the learned trial Judge does not agree, does not make the jury's opinion a perverse or unreasonable one. Apart from this, there is the fact that the trial itself was not according to law because the charges were wrongly joined. Two distinct offences of theft in two separate houses were tried at one and the same trial, and the alternative charges under S. 411, Indian Penal Code, were also in respect of each of these transactions. In other words, there were two charges under S. 411 in respect of the properties stolen from the two houses. We see no reason to accept the reference. The records are therefore returned to the Sessions Judge. The accused is acquitted and he should be set at liberty unless liable to be detained for some other cause.

K.C. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Rao Bahadur K. Sambasiva Chettiar .. *Appellant* (1st Respondent)*

v.

The Right Hon'ble the Secretary of State for India in Council represented by the Collector of Chingleput and others .. *Respondents (Petitioner and Respondents 2, 3 and 4).*

Sambasiva Chettiar *v.* Secretary of State for India in Council.

Mortgage—Receiver appointed in a suit on a simple mortgage—If creates a charge in favour of the mortgagee in respect of rents and profits—Amount due to the Government from mortgagor in respect of kudimaramath—*Priorities.*

In a suit on a simple mortgage a receiver was appointed over the mortgaged properties. An amount was due from the mortgagor to the Government in respect of *kudimaramath* which had accrued due before the appointment of the receiver. In a claim for directions to the receiver to pay the amount due to the Collector,

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* A. A. O. No. 339 of 1937. 4th September, 1939.

Sambasiva Chettiar *v.* Secretary of State for India in Council.

Held, in India at any rate a simple mortgage does not bind the rents and profits of the hypotheca. The appointment of a receiver in a suit on a simple mortgage does not really enlarge the scope of the mortgage. The mortgagee has no charge over the rents and profits in the hands of the receiver.

Case-law considered.

Though the Court recognises an equity over other simple creditors, the claim of the Crown is paramount.

Manikkam Chettiar v. *Income-tax Officer, Madura South,* (1938) 1 M.L.J. 351: I.L.R. (1938) Mad. 744 (F.B.), relied on.

And quite apart from the fact that it is a debt due to the Crown, it is a legitimate expense which the receiver should pay as an incident of his management of the property.

Appeal against the order of the Court of the Subordinate Judge of Chingleput dated 19th January, 1937 and made in M. P. No. 405 of 1936 in O. S. No. 33 of 1936.

S. Ramachandra Aiyar for Appellant.

The Government Pleader (*B. Sitarama Rao*) for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of an order giving directions to the receiver appointed at the instance of the plaintiff in a suit on a simple mortgage to pay to the Collector a sum of money due by the mortgagor by way of the value of labour known as *kudimaramath* for which the mortgagor was obliged to pay under the Madras Compulsory Labour Act. The amount due from the mortgagor in respect of *kudimaramath* had accrued due before the appointment of the receiver. The Collector was, of course, not a party to the suit on the mortgage and he filed an application under O. 40, r. 1, Civil Procedure Code, praying the Court to pay the money due to the Government out of the amount in deposit or to direct the receiver to pay it. A preliminary objection was taken that no appeal lies. It is contended that this is not in fact an order to the receiver under O. 40, r. 1 but a mere order under S. 151 for payment out of Court at the instance of the Government. The answer to this contention is that the Collector's application was framed under O. 40, r. 1 and that in fact the payment was directed by means of an order to the receiver which clearly falls under O. 40, r. 1 and is therefore appealable.

The question therefore is whether the debt due to the Crown is entitled to priority over the debt due to the mortgagee in respect of the amount recoverable from the income of the

Sambasiva Chettiar v. Secretary of State for India in Council.

mortgaged property. The appellant contends that the appointment of a receiver in a suit on a simple mortgage creates what is practically a charge in favour of the mortgagee for the rents and profits of the land. He relies on certain observations in *Maharaja of Pithapuram* v. *Gokuldoss Goverdhana Doss*[1], on a passage in the judgment of Ramesam, J., in the Full Bench ruling in *Paramasivan Pillai* v. *Ramasami Chettiar*[2] and on the observations of Madhavan Nair, J., in *Khader Mohideen Sahib* v. *Nagu Bai*[3]. It is true that there are in these judgments phrases which give some colour to the theory that when a receiver has been appointed the right of the mortgagee to a preferential lien over the rents in respect of his mortgage-debt to the extent to which it is not covered by the hypotheca, is based on the theory that the rents are regarded as being added to the security for the mortgage-debt. But it seems to me that this view is clearly erroneous and that it was not in fact the basis of the decisions in the three cases above referred to. In India at any rate a simple mortgage does not bind the rents and profits of the hypotheca. The appointment of a receiver in a suit on a simple mortgage does not really enlarge the scope of the mortgage. The true nature of the proceeding is that the Court creates a machinery whereby the mortgagor is prevented from dissipating the funds which would normally be used to defray the interest on the mortgage, the object of the machinery being simply to prevent the mortgagor from profiting by the law's delays. The receiver collects the rents in the first instance for the benefit of the mortgagee against the contingency of the hypotheca being insufficient. If the hypotheca satisfies the mortgage-debt then the receiver holds the rents for the mortgagor. The theory that these rents are charged in favour of the mortgagee seems to have arisen out of the difficulty of finding a legal basis for the rule that the mortgagee at whose instance a receiver has been appointed is entitled to priority as against the simple creditors of the mortgagor in claiming the funds in the hands of the receiver, should the hypotheca fail to satisfy his debt. The true basis of this rule is not, I think, that there is any charge in favour of the mortgagee but that the Court gives preference to the mortgagee over the simple creditors in respect

1. (1931) 61 M.L.J. 111: I.L.R. 54 Mad. 565.
2. (1933) 65 M.L.J. 222: I L.R. 56 Mad. 915 (F.B.).
3. (1939) 1 M.L.J. 730: I.L.R. (1939) Mad. 496.

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of those moneys merely by way of justice and equity in order to ensure that the mortgagee shall not be damnified by the protraction of the suit. The decision in *S. C. Venkanna* v. *Mangammal*[1], lays it down that the preferential claim of the mortgagee to the profits in the hands of the receiver is not based on any substantive rights to those profits which the terms of the mortgage do not warrant, but is merely granted by way of an equitable relief to the mortgagee against the consequences of the delay in enforcing his legal remedy. If it is conceded that a mortgagee has no charge over the rents in the hands of the receiver, it is difficult to see how he can have a preferential claim as against the Crown. His preferential claim as against the simple creditors has been recognized, but not, so far as I am aware, on any other grounds than as an equity which is recognised in his favour as a diligent creditor trying to enforce his legal remedy. As against all the unsecured creditors the claim of the Crown is paramount. *Manikkam Chettiar* v. *Income-tax Officer, Madura South*[2]. The lower Court has relied on a decision in *Soniram Rameshur* v. *Mary Pinto*[3] which at page 474 quotes with approval an unreported decision of the Rangoon High Court to the effect that a receiver appointed in a mortgage suit can be directed at the instance of the Crown to pay out of the rents and profits collected from the mortgaged land income-tax due by the mortgagor. One might be chary of treating a brief summary of an unreported decision as an authority in the absence of the full text of the judgment, but I am of opinion that the decision which appears to have been given in that case is based on correct principles. If there is no charge in favour of the mortgagee and if the mortgagee is merely in the position of a simple creditor in whose favour the Court recognises an equity over other simple creditors, there is no reason why the ordinary rule that a debt due to the Crown has preference over all other unsecured debts should not be enforced in this case. The circumstances of the present case give an additional weight to the claim of the Crown. It is true that money due from a ryot who has defaulted in his duty to perform the customary labour for the protection of the irrigation source of his land is not charged on the land, though it may be recovered as an arrear of land revenue. At the same

1. (1936) I.L.R. 14 Rang. 308 (F.B.).
2. (1938) 1 M.L.J. 351: I.L.R. (1938) Mad. 744 (F.B.).
3. (1933) I.L.R. 11 Rang. 467.

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time the payment of these dues is a legitimate expense which the holder of the land ought to incur for the protection of the land. And although in the present case the amount became payable before the receiver was appointed it is in my opinion a legitimate expense which the receiver should pay as an incident of his management of the property, quite apart from the fact that it is also a debt due to the Crown and so entitled to priority. Whichever way therefore one regards this claim, it is one which must be preferred to the claim of the mortgagee. I therefore dismiss the appeal with costs.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Yenamandra Jagannadham .. *Appellant** (*Plaintiff*)

v.

Theerthala Adilakshmi and others .. *Respondents* (*Defendants*).

Jagannadham v. Adilakshmi.

Hindu Law—Inheritance—Brother's son's daughter—If entitled to inherit.

A brother's son's daughter is only four degrees removed from the common ancestor being less than seven degrees in ascent and descent from the last male owner and the test of mutuality also is satisfied. Female *bandhus* are not disqualified by reason of their sex only. She is entitled to rank as an heir under Hindu Law.

Kutti Ammal v. *Radakristna*, (1875) 8 M.H.C.R. 88, relied on.

Appeal against the decree of the Court of the Subordinate Judge of Vizagapatam in A. S. No. 197 of 1934 preferred against the decree of the Court of the District Munsif of Rajam in O. S. No. 157 of 1928.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Appellant.

B. Jagannadha Das for Respondents.

This second appeal came on for hearing, before *Wadsworth, J.* who made the following

ORDER OF REFERENCE TO A BENCH.†

It seems to me that this appeal, which involves a decision of the question whether a *brother's son's daughter* is an heir under the

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*S.A. No. 595 of 1936. 27th November, 1939.
† 16th October, 1939.

Mitakshara Law as administered in Madras, should be posted before a Bench, there being no direct authority so far as I am aware. The following geneological tree shows the position:—

Kamayya

- Kurmayya (died long ago)
  - Suryanarayana (died 1915, before Suramma): first defendant
    - Second defendant (daughter).
- Propositus Narasayya (died before 1895): Viramma (died 1925)
  - Suramma (died 1915)
    - Adopted son (died before 1915).

The plaintiff (appellant) sues for possession of property formerly enjoyed by Viramma as heir of her husband Narasayya. Plaintiff (a relative of Viramma) put forward a title based on the will of Suramma (to whom Viramma had gifted the properties) and on a surrender by the presumptive reversioner Suryanarayana, who died long before the reversion opened. Quite obviously this title will not prevail against the right of the nearest reversioner to Narasayya's estate. The trial Court found that plaintiff was in possession at any rate during the lifetime of Viramma, that defendants 1 and 2 were not reversioners of Narasayya and that plaintiff was entitled to a decree. The Subordinate Judge abstained from giving any finding on the two additional issues (relating to the possession of the plaintiff and the heirship of the defendants 1 and 2) framed by the District Judge before remand but dismissed the suit on the strength of his conclusion that plaintiff had not proved title or adverse possession. He appears to have overlooked the fact that plaintiff is entitled to claim a decree on the strength of his possessory title if defendants 1 and 2 are mere trespassers. With reference to the heirship of second defendant he refers to a statement that there are nearer heirs, namely, the sister of Suryanarayana and her son, which statement so far as I can find, receives no support in the evidence unless it can be deemed that a question asked in cross-examination of P W. 2 which elicited the reply, "I do not know" can be deemed to be evidence. Since the heirship of second defendant was in issue and there is no evidence of nearer heirs, it must be taken that they do not exist, especially in view of the fact that plaintiff pleaded that there were no heirs at all and defendants 1 and 2 pleaded that they were the nearest heirs. If neither of defendants 1 and 2 is found to have title, a remand will

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be necessary to the lower appellate Court for a finding on the second additional issue.

It cannot, I think, be contended that the widow of a brother's son is an heir. She has no community of blood with the propositus and cannot be a bhinnagotra sapinda. The position of the brother's son's daughter, second defendant, is however different. She is certainly a bhinnagotra sapinda or bandhu within the five degrees. On the authorities, she would be excluded by any male bandhu entitled to succeed. But in the absence of a male heir, can it be said that the brother's son's daughter will not be entitled to inherit to her great uncle? The authorities are summarised in Mayne's Hindu Law, 10th Edition, paragraphs 509 and 510. The learned author quotes *Lakshmanammal* v. *Thiruvengadal*[1] and *Venkatasubramaniam Chetti* v. *Thayarammah*[2] and opines that the reasoning of these judgments is unassailable and applies to all descendants, ascendants and collaterals within five degrees. Hitherto the rights of the son's daughter, the daughter's daughter and the sister have been confirmed by legislation while the rights of the father's sister, brother's daughter and sister's daughter have been recognised by Madras decisions. I do not think that the right of the brother's son's daughter to succeed has ever been expressly recognized or negatived by a Madras authority. But the following propositions seem to be established:

(1) A brother's son's daughter is a bandhu within the five degrees.

(2) A female bandhu is not disentitled to inherit (in the absence of a male heir) merely by reason of her sex.

(3) The heirship of female bandhus is not limited to those mentioned in express texts but is governed by the propinquity of their blood relationship.

Granted the truth of these propositions, it seems to follow that in the absence of male heirs a brother's son's daughter would be entitled to inherit.

But the subject being uncovered by authority and the decision being one likely to affect the position of other female bandhus of like degree, it seems to me desirable that the appeal should be placed before a Bench. The appellant should furnish typed translations of the pleadings and typed copies of the depositions which have not been printed for the use of the Bench.

This appeal came on for hearing in pursuance of the above Order of Reference to a Bench,

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1. (1882) I.L.R. 5 Mad. 241. 2. (1898) I.L.R. 21 Mad. 263.

Jagan-nadham v. Adilakshmi.

Krishna-swami Aiyangar, J.

The judgment of the Court was delivered by

Krishnaswami Aiyangar, J.—This is a second appeal which came before Mr. Justice Wadsworth in the first instance. The question raised in it related to the right of a brother's son's daughter to inherit under the Hindu Law. The precise question is not covered by authority in this Presidency and for that reason the learned Judge has referred the point for consideration by a Bench.

The appellant was the plaintiff in the trial Court. He instituted the suit for the recovery of possession of property which appertained to the estate of one Narasayya who died some time before 1895. He was succeeded by his widow, Viramma, who in 1895 entered into an arrangement with the next reversioner Suryanarayana who was her husband's brother's son. By that arrangement, Suryanarayana in consideration of a sum of Rs. 100 agreed to Veeramma holding the estate as absolute owner—a transaction which is admittedly invalid under Hindu Law. Viramma having thus secured, as she probably thought, a valid right to dispose of the estate, made a gift of the property to her daughter Suramma in 1908. The daughter died in 1915 having in her turn purported to bequeath the property in favour of the appellant in this second appeal. The appellant's case thus rests in the arrangement of 1895, which is totally void—a point which is not disputed.

The appellant's case is that he took peaceful possession of the property under the will and continued to enjoy the property undisturbed till 1925. That was the year in which Viramma died. After her death, the first respondent, who is Suryanarayana's widow and the second respondent, his daughter, dispossessed him of the property. The District Munsif decreed the suit. On appeal by the respondents, the District Judge allowed the appeal holding that the second respondent was entitled to retain possession of the property on the ground that she had succeeded to the estate as the next heir of Narasayya. It is admitted that if she is an heir under the Hindu Law, the appellant must fail, as his rights based on mere possession cannot prevail against those of the true owner. The only question then is whether the second respondent is not the true owner, and whether she has not succeeded to the estate of Narasayya in the events which have happened.

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The second respondent is the daughter of a brother's son of the propositus, and is only four degrees removed from Narasayya's father, the common ancestor. She is thus within the prescribed limit of proximity, being less than seven degrees in ascent and descent from the last male owner. Further the test of mutuality is also satisfied as she and Narasayya are sapindas of each other in the Mitakshara sense of the term. Her right to succeed to the estate cannot be questioned except on the ground that being a female she is not within the class of heritable bandhus. But it is now too late in the day to question the proposition that under the Hindu Law as administered in this Presidency, female bandhus are entitled to come in after the male bandhus are exhausted, provided of course they satisfy the other conditions required by law. A series of decisions of this Court commencing from *Kutti Ammal* v. *Radhakrishna*[1] have established their right to rank as heirs under Hindu Law. It is true that there has been no direct decision relating to the right of a brother's son's daughter to inherit. But this can make very little difference, once it is established, as we hold it to be, that females are not to be disqualified by reason of their sex only. This proposition is firmly established for such a length of time that it is unnecessary to discuss it. The second appeal therefore fails and must be dismissed with costs.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMY AIYANGAR.

Municipal Council, Adoni .. *Appellant** (*Respondent*)

v.

G. V. C. Babu Naidu .. *Respondent* (*Appellant*).

Municipal Council Adoni v. Babu Naidu.

Madras District Municipalities Act (V of 1920), Ss. 93 (1) and 94-A—Licensee's agent transacting business within Municipality—Levy of profession-tax—Meaning of 'transaction of business'—Retail customers—Prices being fixed by Government, not altering character of transaction.

For the purpose of S. 93 (1) of the Madras District Municipalities Act, 1920, if a person assessed to tax by the Municipality is a licensed distiller of arrack at another place, but his agent sells arrack to licensed retail dealers within the Municipality, the Municipal Council has the right to levy profession-tax on the agent who transacts business within the Municipality for not less than sixty days in the half year. S. 94-A says that if a person employs a

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1. (1875) 8 M.H.C.R. 88.

* L.P.A. No. 82 of 1938. 28th November, 1939.

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servant or agent to represent him for the purpose of transacting business in a Municipality the person shall be deemed to transact business there and the servant or agent shall be liable for the profession-tax whether or not he has power to make binding contracts on behalf of his employer.

The fact that the prices which the agent charges are fixed by the Government does not make his transaction any the less sales; nor does the fact that the licencee's agent's only customers in the Municipality are licensed retail dealers alter the character of the transactions.

The Municipal Council of Cocanada v. *The "Clan Line" Steamers, Ltd*, (1918) 36 M.L J. 226: I.L R. 42 Mad. 455 and *Hajee Shaikh Meera Rowther* v. *The President of the Corporation of Madras,* (1909) I.L R. 33 Mad. 82, distinguished.

Appeal preferred under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Wadsworth dated 21st September, 1938* and passed in S A. No. 597 of 1934 preferred against the decree of the District Court of Bellary in A. S. No. 26 of 1933 (O. S. No. 508 of 1932, District Munsif's Court, Bellary).

M. S. Ramachandra Rao for Appellant.

P. Chandra Reddi for Respondent.

The judgment of the Court was delivered by

Leach, C.J

The Chief Justice.—The appellant is entitled to succeed. The appeal arises out of a suit filed by the respondent in the Court of the District Munsif of Bellary for a declaration that the appellant council had acted illegally in requiring him to pay profession-tax in respect of the three half years ending with 31st March, 1931, 30th September, 1931 and 31st March, 1932, and for an injunction restraining the appellant from levying the tax. The District Munsif held that the respondent was liable to the tax except in respect of the half year which ended with 31st March, 1931. He was of the opinion that the respondent was not liable in respect of that half year because the notice of demand had not been given within the required period. The respondent appealed to the District Judge of Bellary in respect of the reliefs which had been refused him and the appellant filed a memorandum of objections challenging the correctness of the District Munsif's decision that the respondent was not liable to pay the tax in respect of the first of the three half years. The respondent's appeal failed and the appellant's memorandum of objections was accepted. The result was that the District Judge dismissed the suit with costs. The respondent then filed a second appeal which was heard by Wadsworth, J., who allowed

* (1938) 2 M.L.J. 1035.

it. The learned Judge held that the respondent was not liable for the payment of the profession-tax because in his opinion the respondent was not carrying on business at Adoni.

The facts are these. The respondent is a licensed distiller and owns an arrack distillery at Bellary. Under the terms of his license he is required to maintain depots for the sale of arrack at various places in the Bellary District. One of these places is Adoni. The depot at Adoni is in charge of an agent of the respondent and he sells arrack to licensed retail dealers. The price is fixed by the Government and the sales are restricted to licensed retail vendors. The money received in respect of arrack sold at the Adoni depot is paid by the respondent's agent into the treasury the same evening. The question which arises is whether in these circumstances the respondent transacts business in Adoni within the meaning of S. 93 (1) of the Madras District Municipalities Act, 1920. The section gives a Municipal Council the right to levy profession tax on a person who transacts business within the Municipality for not less than sixty days in any half year. S. 94-A says that if a person employs a servant or agent to represent him for the purpose of transacting business in a Municipality the person shall be deemed to transact business there and the servant or agent shall be liable for the profession-tax whether or not he has power to make binding contracts on behalf of his employer. Wadsworth, J., held that the respondent was not carrying on business within the Municipal area of Adoni, and his reasons may be gathered from the following passage in his judgment:—

"It is true that the depot keeper at Adoni has authority to deliver goods in return for cash and I suppose that on the narrowest view it might be said that every time he delivered liquor in return for cash there is an executed contract of sale. But his control over the trade is in fact purely mechanical. The price is fixed elsewhere; the vendee must be only certain licensed persons; the money is paid straight into an account in the treasury and all these accounts from which profits can be ascertained and with the help of which control can be exercised are maintained in Bellary."

The learned Judge here disregards the essential factor that the respondent's agent in charge of the Adoni depot enters into contracts for the sale of arrack on behalf of his master who makes profits on these transactions. A person who sells goods in a particular place must be deemed to be carrying on business in that place and the respondent sells arrack at Adoni. The fact that the prices which he charges are fixed by the Government does not make his transactions any the less sales;

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nor does the fact that the respondent's only customers at Adoni are licensed retail dealers alter the character of his transactions. The fact that the respondent's agent is required to pay into the treasury at the close of a day's business the moneys which he has received for the arrack sold that day has no bearing on the question and the same is to be said with regard to the keeping of accounts at Bellary. The respondent sells arrack at Adoni and therefore is carrying on business at Adoni within the meaning of S. 93 of the Act. It would be a different matter if all contracts for the supply of arrack were made in Bellary and goods were merely delivered in Adoni through an agent, but that is not the position.

In the course of his judgment the learned Judge referred to *Grainger & Son* v. *Gough*[1], *The Municipal Council of Cocanada* v. *The "Clan Line" Steamers, Ltd.*[2], *Hajee Shaikh Meera Rowther* v. *The President of the Corporation of Madras*[3] and *Eastern Distilleries and Sugar Factories, Ltd.* v. *The Municipal Council, Negapatam*[4]. None of these cases lends support to the opinion which he has expressed. The case of *Grainger & Son* v. *Gough*[1] had reference to a French firm which sold wine through a commission agent in London. The agent obtained orders from persons in England for the firm's wine which was sold to the customers as it lay in the firm's cellar at Reims. The customer paid the cost of packing and carriage and took all the risk. Therefore the delivery to him took place in France. The question was whether the French firm was exercising a trade in the United Kingdom and it was held that it was not.

In *The Municipal Council of Cocanada* v. *The "Clan Line" Steamers Ltd.*[2], the question was whether a shipping company which had an agent in Madras and a sub-agent at Cocanada was liable to be taxed at Cocanada as a firm transacting business there. The shipping company earned profits by carriage of goods by sea and in the course of its business loaded and unloaded goods at Cocanada. Its head office was at Glasgow, but its principal agent in the Madras Presidency had his office at Madras. The sub-agent at Cocanada had no power to enter into contracts with shippers. This could only be done by the agent at

1. (1896) A.C. 325.
2. (1918) 36 M.L.J. 226: I.L.R. 42 Mad. 455.
3. (1909) I.L.R. 33 Mad. 82.
4. (1932) 38 L.W. 226.

Municipal Council, Adoni *v.* Babu Naidu.

Leach, C.J.

Madras. The company was assessed by the Municipality of Cocanada to tax under S. 53 of the District Municipalities Act (IV of 1884) for exercising its trade and carrying on business in Cocanada. It was held that the company was not liable for the tax as it was not transacting business in Cocanada. The difference between that case and the present case is that the sub-agent at Cocanada had no authority to enter into contracts on behalf of the company's clients and no contracts were entered into there. All the contracts were entered into in Madras. In the present case, the contracts are entered into in Adoni and the goods are supplied there.

Hajee Shaik Meera Rowther v. *The President of the Corporation of Madras*[1], was a similar case. A firm had its place of business in Tinnevelly, but kept an agent in Madras for the purpose of purchasing piece goods for despatch to Tinnevelly where they were sold. It was held that the firm was not liable to profession-tax in Madras. The case of *Eastern Distilleries and Sugar Factories, Ltd.* v. *The Municipal Council of Negapatam*[2], has no bearing at all on the question under discussion. The question there was whether the company had an office at Negapatam and the decision turned on the meaning to be attached to the word 'office' in r. 16 of Schedule IV of the Madras District Municipalities Act, 1920. That question does not arise here.

After we had intimated that we could not accept the decision of the learned Judge on the question whether the respondent was carrying on business in Adoni an attempt was made to support the judgment on the ground that there had been irregularities in the demands in respect of the three half years. The alleged irregularities formed no part of the case set forth in the plaint, and no issue was framed on the question. The District Munsif did allow the question of the validity of the demand for the first half year to be raised, but the District Judge reversed his decision on the ground that this contention had not formed part of the respondent's case and the appellant had not had notice of it in time to meet it. It is said that if the council had had notice it would have been in a position to show that on the facts the contention could not be maintained. We consider that the District Judge adopted the right attitude in refusing to allow the matter to be raised. It follows that we are

1. (1909) I.L.R. 33 Mad. 82. 2. (1932) 38 L.W. 226.

Municipal Council, Adoni v. Babu Naidu. — Leach, C.J.

not prepared to allow it to be raised in this Letters Patent Appeal.

The appeal will be allowed and the respondent's suit dismissed with costs here and in the Courts below.

K. C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR SIDNEY BURN, *Officiating Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

N. K. R. M. N. Nagappa Chettiar and others .. *Appellants* (Plaintiffs 2 to 5 and Defendants 3 to 6)*

v.

Raja Srimanthu Muthu Vijaya Raghunatha Doraisingam *alias* Gouri Vallabha Thevar Avl., Zamindar of Sivaganga through his authorised agent and Diwan Mr. R. M. Sundaram Esq., and another .. *Respondents (Defendants 1 and 7).*

Nagappa Chettiar v. Zamindar of Sivaganga.

Madras Court of Wards Act (I of 1902), S. 49—Notice as condition precedent to institution of suit against Court of Wards—Proper form.

A notice to the Court of Wards who were in management of an estate was issued on behalf of the deities and it was contended that the notice was invalid as it did not contain a proper description of the intending plaintiff. In the notice in question the names of the temples were mentioned as also the village in which they are situate.

Held, it is sufficient compliance with S. 49 even on a strict construction. Although the names of the managers are mentioned as the plaintiffs and although they have been described in the plaint as trustees, in the eye of the law, they are merely the managers, the deities themselves being the true plaintiffs in fact.

Appeal under cl. 15 of the Letters Patent against the judgment and decree of the Honourable Mr. Justice Wadsworth dated 12th January, 1939 and passed in S. A. No. 1076 of 1936 preferred to the High Court against the decree of the District Court of Ramnad at Madura in A. S. No. 216 of 1933 (O. S. No. 131 of 1929, Sub-Court, Devakottai).

S. V. Venugopalachari for Appellants.

M. E. Rajagopalachari for Respondents.

The judgment of the Court was delivered by

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—This is an appeal under the Letters Patent from the judgment of Wadsworth, J., who con-

* L. P. A. No. 13 of 1939. 2nd January, 1940.

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firmed on second appeal the decision of the District Judge, Ramnad, reversing the judgment of the Subordinate Judge of Devakottah in O.S. No. 151 of 1929 on his file. The suit had been instituted by the trustees and hukhdars of three temples in the village of Naganathapuram, for a declaration that the boundaries fixed by the survey authorities between the village of Veeriyanandal belonging to the temples, and the adjacent village of Senjai belonging to the zamindar of Sivaganga were wrong and for the rectification of those boundaries in accordance with the true rights of the parties. At the time of the survey and at the date of the suit the Sivaganga zamindari was under the management of the Court of Wards and the latter were accordingly joined as the first defendant in the suit. The Court of Wards however dropped out of the litigation after the disposal of the suit in consequence of the zamindar having assumed possession of the estate. The zamindar stepped into their place in the lower appellate Court and has since been contesting the claim of the plaintiffs. The Subordinate Judge decreed the suit disallowing all the contentions raised by the Court of Wards. One of those contentions was that the suit was incompetent as the condition precedent to the institution of a suit against the Court of Wards, namely, the issue of a proper notice under S. 49 of the Madras Court of Wards Act, had not been fulfilled. A registered notice Exhibit M in the case had been given to the Court of Wards before suit, but it was attacked as being defective in material particulars and therefore invalid. Differing from the trial Court, the learned District Judge on appeal upheld that contention and accordingly dismissed the suit. A second appeal was preferred to this Court and it came on before Wadsworth, J. He concurred with the decision of the learned District judge and dismissed the second appeal. Leave was however given by the learned Judge for preferring a Letters Patent appeal against his judgment and the appeal accordingly now comes before us.

The notice in question is as follows:—

To,

1. The District Collector of Ramnad and Agent of the Court of Wards Sivaganga estate at Madura.
2. The Estate Collector, Court of Wards, Sivaganga Estate, Sivaganga.

Sir,

On behalf of the devasthanams of Perumal Koil, Sivan Koil and Pillayar Koil, etc. in Naganathapuram and the trustees thereof V N. Venkata-

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chalam Chettiar and others, I hereby give you notice under the provisions of the Court of Wards Act as follows.

The notice then proceeds to set out the cause of action and the relief claimed. The only defect in the notice which is said to invalidate it is that it does not contain a proper description of the names and the places of abode of the intending plaintiffs. In particular it is said that whereas there are five plaintiffs who joined in instituting the suit, the name of one of them alone, namely, Venkatachalam Chettiar is mentioned in the notice and the names of the others have been entirely omitted; nor has the address even of Venkatachalam Chettiar been given. It is clear that if the suit is to be regarded as a suit by the trustees, the notice must be held defective as the requirements of S. 49 have not been satisfied. In the light of the decision of the Privy Council in *Bhagchand Dagadusa* v. *The Secretary of State for India*[1], full effect must be given to the language of the statute and it is not permissible to put a liberal construction upon that language or to say that it will be enough if there is a substantial compliance with the conditions of the section. The statute has laid down certain definite formalities to be observed as a preliminary to a suit against the Court of Wards and we cannot whittle down the effect of S. 49 by adopting a liberal or beneficent interpretation.

The appellants have however placed before us an argument which to our mind appears to have great force. They contend that the notice fully complies with the requirements of S. 49 in as much as the names and address of the devasthanams which are the real plaintiffs are mentioned which, it is urged, is all that is required by the statute. In the case of such temples it is now settled that the presiding deity is a juristic entity having itself the right to sue and be sued. In *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick*[2] Lord Shaw delivering the judgment of the Privy Conncil laid down the law on the point in these terms:—

"A Hindu idol is, according to long-established authority, founded upon the religious customs of the Hindus, and the recognition thereof by Courts of Law, a "juristic entity." It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir. It is unnecessary to quote the authorities, for this doctrine, thus simply stated, is firmly established."

1. (1927) 53 M.L.J. 81: L.R. 54 I.A. 338: I.L.R. 51 Bom. 725 (P.C.).
2. (1925) 49 M.L.J. 30: L.R. 52 I.A. 245: I.L.R. 52 Cal. 809 (P.C.).

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It follows that the real plaintiffs in the suit are the presiding deities of the devasthanams mentioned. Although the managers are often described as trustees they are not trustees in law as the devasthanam properties are not vested in them in trust. A notice which complies with the requirements of S. 49 so far as the temples are concerned cannot therefore be said to be open to objection for the reason that the names and addresses of the managers have not been stated. In the notice in question the names of the temples are mentioned as also the village in which they are situate. This in our opinion is a sufficient compliance with S. 49 even on a strict construction.

It is true that in the cause-title to the plaint the names of the managers are mentioned as plaintiffs without reference to the temples or the presiding deities. In paragraph 3 of the plaint it is however stated that the plaintiffs are some of the trustees and hukhdars of the devasthanam consisting of the Perumal Koil, Sivan Koil and Pillayar Koil, etc., in Naganathapuram, Karaikudi. In para. 4 the further statement occurs that the village of Veeriyanendal belongs to and is in the enjoyment of the said devasthanam. Looking at the plaint as a whole it is absolutely clear that no personal rights of the plaintiffs were asserted in the suit. Although the names of the managers are mentioned as the plaintiffs and although they have been described in the plaint as trustees, it is clear in the eye of the law that they are merely the managers, the deities themselves being the true plaintiffs in fact. The proper form of a suit where a deity figures as a party has been the subject-matter of consideration by a Full Bench of the Allahabad High Courtin *Jodhi Rai* v. *Basdeo Prasad*[1]. The proposition was there laid down that inasmuch as an idol is a juristic person capable of holding property, a suit in respect of property in which an idol is interested is properly brought or defended in the name of the idol, although *ex necessitate rei* the proceedings in the suit must be carried on by some person who represents the idol, usually the manager of the temple in which the idol is installed.

Regarding the suit, as we must regard it, as a suit instituted by the presiding deities of the three temples we must hold that a notice issued on behalf of the devasthanams stating their names and the village in which they are situate is a proper notice within S. 49 of the Madras Court of Wards Act. It follows

1. (1911) I.L.R. 33 All. 735.

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that the appeal must be allowed and the decree of the learned Subordinate Judge restored except in regard to the portion of S. No. 13 in Veeriyanendal village claimed in the suit but not referred to in the notice. The respondents must pay the costs of the appellants both in this Court as well as in the District Court.

K. S. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD THANKERTON, LORD ROMER AND SIR GEORGE RANKIN.

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Janaki Nath Roy v. Pramatha Nath Malia.

Raja Janaki Nath Roy and another .. *Appellants**

v.

Raja Pramatha Nath Malia and others .. *Respondents.*

Mortgage—Subrogation—Conditions for applicability of principle—Payment of entire amount due on prior encumbrance—Doctrine of consolidation—Applicability—Transfer of Property Act (IV of 1882 as amended), S. 92—"Mortgage has been redeemed"—Effect of expression.

In order to entitle a person to invoke the equitable doctrine of subrogation he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected. Further a person who claims to be subrogated to the rights of a mortgagee must pay the entire amount of the encumbrance. Payment of a portion only of the encumbrance is not sufficient.

A mortgagor by successive instruments mortgaged four properties, *A*, *B*, *C* and *D*, to the plaintiffs. Each sum advanced was expressed to be charged also on the property or properties previously mortgaged and each property newly mortgaged was expressed to be charged also with the sums previously advanced. At a time when the sums on the first three mortgages, but not on the fourth, were already due, the defendant paid off the first three sums with money which he had advanced to the mortgagor under a registered deed providing *inter alia* that he, the defendant, should pay the plaintiffs the sums due on all four mortgages and then be subrogated to their rights under those mortgages. The defendant having declined to pay off the sums owing under the fourth mortgage when they fell due, those sums remained owing whereupon the mortgagees instituted a suit to enforce that mortgage by sale of all four properties, impleading the defendant with the mortgagor and others because he maintained that he was in the position of a first mortgagee with regard to properties *A*, *B* and *C*. It was held that the fourth mortgage to the plaintiffs did not operate as a single mortgage on all the four properties and that the three earlier mortgages were subsisting.

Held, that the defendant was entitled to be subrogated to the rights of the mortgagee in respect of the prior encumbrances either under S 92 of the

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* P. C. Appeal No. 87 of 1928. 10th November, 1939.
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Transfer of Property Act, 1882, as amended, or under the general law, and that the plaintiffs were entitled to enforce their rights against property *D* only.

Gurdeo Singh v. *Chandrikah Singh*, (1907) I.L.R. 36 Cal. 193, approved.

Held, further, that the doctrine of consolidation was not applicable to the case as the properties were not independently mortgaged.

The doctrine of consolidation can only apply where a mortgagee holds a mortgage on property *A* and also a separate mortgage on property *B* belonging to the same mortgagor. In such a case after the expiry of the legal right of redemption the mortgagor in cases where the right of consolidation is still applicable is only allowed to exercise his equitable right of redemption of the one property on the terms of redeeming the other. In the case however of a mortgagee holding a first mortgage on property *A* and also a second mortgage on the same property the mortgagor cannot on payment of the first mortgage redeem the property, that is to say, claim a reconveyance and delivery up of the title deeds and so forth, unless he repays what is due on the second mortgage.

Decision of the Calcutta High Court affirmed.

On appeal from a Judgment of the High Court of Judicature at Fort William in Bengal dated 1st December, 1936, which varied a decree of the Additional Subordinate Judge Howrah dated 3rd January, 1933.

L. P. E. Pugh, K.C. and *J.M. Pringle* for Appellants.—It is submitted first that the fourth mortgage was comprehensive of all the four properties putting an end to the then earlier mortgages, and that therefore the fourth respondent is not entitled to be subrogated. But in any event even if that point fails, the fact remains that properties *A*, *B* and *C* are charged also with the sums owing under the fourth mortgage, and that until those sums are repaid those properties cannot be redeemed. The redemption of the properties is the essential pre-requisite laid down by the Transfer of Property Act if a person is to be entitled to be subrogated. It is not enough that he should have paid off the sums owing in respect of those properties. Finally, nothing can be said to have defeated the appellant's rights of consolidation. The High Court relied on the fact that, when the first three mortgages were paid off the money due in the fourth had not yet become due but that fails to take account of the fact that the fourth mortgage specifically charged all the four properties.

Sir Herbert Cunliffe, K.C. and *W. Wallach* for 4th Respondent—The principle of consolidation does not apply to this case because the reason why properties *A*, *B* and *C* cannot be redeemed is not that the charges on them have been consolidated with the charge of property *D* but because they are themselves charged by way of second charge with the charge on property *D*. That is not a case for consolidation at all. The appellants when they accepted payment of the sums due under the first three mortgages, knew all

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about the agreement of December, 1927, between the respondent and the mortgagor and they therefore knew that the respondent was to be subrogated to their rights. As far as the fourth respondent had paid off the sums due under the first three mortgages, he had satisfied the pre-requisites for subrogation laid down by S. 92. How can it be argued that the section really requires redemption of the mortgaged properties? If they had to be redeemed and the mortgagor in fact redeemed them, there would be no rights left to which the principle of subrogation can apply. Counsel referred to *Gurdeo Singh* v. *Chandrikah Singh*[1].

10th November, 1939. Their Lordships' judgment was delivered by

Lord Romer.

LORD ROMER.—These are consolidated appeals against the judgment and decree of the High Court of Judicature at Fort William in Bengal dated the 1st December, 1936, which varied the judgment and decree of the Additional Subordinate Judge of Howrah dated the 3rd January, 1933. The question to be decided is whether, as held by the High Court, the respondent No. 4, Kumar Pramatha Nath Roy, is entitled to be treated as a mortgagee of the properties *A*, *B* and *C* hereinafter mentioned, ranking in priority to the mortgage thereon of the appellants, or whether, as held by the Subordinate Judge, the appellants' mortgage ranks in priority to any claim of the said respondent. There was also at one time a question as to the relative priorities of the mortgages of the appellants and the said respondent on property *D*, hereinafter mentioned. It was indeed the question involved in the cross-appeal of the said respondent being the second of the two consolidated appeals. This cross-appeal was, however, abandoned at the hearing before their Lordships and the priority of the appellants' claims in respect of this property is now admitted.

The facts giving rise to the appeals are as follows. On the 8th April, 1924, Raja Pramatha Nath Malia being the respondent No. 1 executed in favour of the appellants a mortgage on certain properties (hereinafter referred to as "property *A*") to secure the sum of 2 lacs of rupees repayable on the 8th April, 1925, with interest at the rate of 10 per cent. per annum. The mortgage was in the usual English form.

On the 30th November, 1925, respondent No. 1 executed another mortgage in favour of the appellants to secure a loan of 1 lac of rupees repayable on the 30th November, 1926, with

1. (1907) I.L.R. 36 Cal. 193.

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interest at the rate of 12 per cent. per annum. The mortgage recites that the mortgagor was entitled to certain properties therein mentioned (hereinafter referred to as "property *B*") and was also enti led to property *A* subject to the said mortgage of the 8th April, 1924, on which it recites that the 2 lacs of rupees and interest were still owing. By the operative part of the deed the mortgagor purported to convey property *B* to the appellants subject to the proviso for redemption thereinafter contained, and also charged property *A* with the repayment of the 1 lac of rupees and interest "by way of additional security"; and also "by way of additional security" charged property *B* with the repayment of the moneys secured by the mortgage of 8th April, 1924. Then followed the proviso for redemption. It in effect provided that if the mortgagor should pay the 1 lac with compound interest at 12 per cent. per annum on the 30th November, 1926, and should "on demand" pay all monies secured by the mortgage of the 8th April, 1924, the mortgagee would reconvey to the mortgagor properties *A* and *B*. There then followed a covenant by the mortgagor for payment of the 1 lac on the 30th November, 1926, and of the interest thereon on the dates therein mentioned.

It is a curious piece of conveyancing, but the effect of it is reasonably clear. The earlier mortgage of the 8th April, 1924, remained unimpaired. It was in no sense replaced by the later mortgage. The 2 lacs of rupees that had become repayable on the 8th April, 1925, remained owing as was recited in the later mortgage, and it was owing by virtue of the covenant to pay it contained in the earlier deed. No demand for repayment was necessary before the appellants could sue for its recovery or enforce the first mortgage on property *A* by which it was secured. The mortgagor could too for his part pay off the 2 lacs and the mortgagee could not refuse to accept them. But the mortgagee had by virtue of the later mortgage a second charge on property *A* to secure the 1 lac payable on the 30th November, 1926, and could not therefore before that date have been compelled to perform the several acts in relation to property *A* specified in S. 60 of the Transfer of Property Act under the headings (*a*), (*b*) and (*c*). The mortgagor could not therefore have redeemed property *A* as distinct from redeeming, that is, paying off the first mortgage thereon.

On the 29th November, 1926, respondent No. 1 executed another mortgage. The money secured this time was 1 lac

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of rupees and the primary security for it consisted of a first charge on certain properties, hereinafter called property *C*. But the 1 lac was also charged on properties *A* and *B* as a third and second charge thereon respectively, and the monies secured by the two prior mortgages were also charged as a first charge on property *C*. The indenture by which all this was carried out contains recitals of the two earlier mortgages (although the indenture of the 30th November, 1925, is recited as being one to secure the sum of 1 lac only) and recites that there was then due and owing by the mortgagor to the mortgagees under the mortgage of the 8th April, 1924, the principal sum of 2 lacs of rupees with interest and under the mortgage of the 30th November, 1925, the principal sum of 1 lac with interest. (This was not quite accurate inasmuch as the 1 lac was not payable until the following day.) Then there followed a recital that the date of repayment of the amount due under the mortgage of the 8th April, 1924, having expired the mortgagees called upon the mortgagor to repay the same but that the mortgagor, being unable then to repay it, had offered to furnish additional security for the amounts that were then or might thereafter be due to the mortgagees under the two mortgages of the 8th April, 1924, and the 30th November, 1925, in the manner thereinafter appearing. By the operative part of the deed the mortgagor, in consideration of the further advance then made to him of another lac of rupees, purported to convey property *C* to the mortgagees, "subject to the proviso for redemption thereinafter contained." It was then witnessed that to secure the repayment of this further lac the mortgagor charged properties *A* and *B* and that the same should not be redeemed or redeemable until "the said sum of rupees 2 lacs and 1 lac secured by the hereinbefore in part recited indentures of mortgage together with interest and costs as in the said indentures respectively mentioned as also the said further sum of rupees 1 lac together with interest and costs as herein mentioned are fully repaid and liquidated."

The mortgagor then by way of further and additional security, and in consideration of the sums due under the earlier mortgages, charged and mortgaged property *C*, and then follows this provision: "And the same shall not notwithstanding anything hereinafter contained be redeemed or redeemable until the said principal sums of rupees two lacs, one lac and

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one lac respectively together with interest thereon as provided by the said recited indentures of mortgage and hereby respectively is fully paid and liquidated." Then there follows a proviso which so far as material is to the following effect: that if the mortgagor should on the 29th November, 1927, pay to the mortgagees the 1 lac then advanced with interest thereon and should pay all the outgoings on properties *A*, *B* and *C*, and should also pay all monies that might be owing under the mortgages of the 8th April, 1924, and the 30th November, 1925, then the mortgagees would reconvey the properties *A*, *B* and *C*. Following upon this proviso there is a covenant by the mortgagor for payment on the 29th November, 1927, of the 1 lac then advanced together with interest at 10 per cent. per annum as therein mentioned.

The provisions contained in this indenture relating to redemption of the various properties are somewhat obscure. They overlap and are to some extent reduntant. For it is quite plain in their Lordships' opinion that the indenture is not and was not intended to be a comprehensive mortgage of properties *A*, *B* and *C* replacing the two earlier mortgages of the 8th April, 19 4, and the 30th November, 1925. Those two mortgages are treated as continuing in existence, and the sums of 2 lacs and 1 lac thereby respectively secured would be recoverable by the mortgagees by virtue of the covenants to pay them therein respectively contained, and not by virtue of any covenant to pay them contained in the indenture in question. For there is no such covenant. At any time after the 29th November, 1926, the mortgagor could have compelled the mortgagees to accept payment of the 2 lacs and the 1 lac and so have redeemed the two mortgages. He could not however have redeemed the properties *A* and *B* with the results mentioned in S. 60 of the Transfer of Property Act. But this would have been due to the fact that the mortgagees, by virtue of the third mortgage, had a third charge on *A* and a second charge on *B* to secure the 1 lac of rupees advanced when the last-mentioned mortgage was executed. The provisions in this mortgage relating to the redemption of these two properties are, in their Lordships' opinion, merely a recognition of this fact.

On the 11th November, 1927, respondent No. 1 executed yet another mortgage in favour of the appellants, this time on properties hereinafter referred to as property *D*, and to secure a

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fresh advance of Rs. 1,25,000 with interest at 9 per cent., to be repaid on the 11th November, 1929. The mortgage (in which respondent No. 2 joined as a guarantor) followed very closely the mortgage of the 29th November, 1926, though in some respects the conveyancing showed a slight improvement. It recited the three earlier indentures of mortgage and that there was then due and owing to the mortgagees "under and by virtue of" the said indentures respectively the principal snms of 2 lacs, 1 lac and 1 lac with certain sums for interest. There followed a covenant to repay the further sum of Rs. 1,25,000, then being advanced with interest thereon at 9 per cent. per annum on the 11th November, 1929, and a "grant" to the mortgagees of property *D* subject to the proviso for redemption thereinafter contained. This proviso was in the usual English form, namely, that if the mortgagor should on the 11th November, 1929, pay the Rs. 1,25,000 with interest, the mortgagees would reconvey property *D* to the mortgagor or as he should direct. But then follows a clause to which the appellants attach much importance. It is in these terms: "And the mortgagor doth hereby declare that all those properties" (being the properties *A*, *B*, *C* and *D*) "shall be a security for and stand charged with the payment to the mortgagees of the moneys due under the said indentures of mortgage dated, respectively, the 8th April, 1924, the 30th November, 1925, and the 29th November, 1926, and the said sum of Rs. 1,25,000 and the interest thereon according to the covenant hereinbefore contained and shall not be redeemable until payment to them of all moneys due under the said mortgages of the 8th April, 1924, 29th November, 1925 (*sic*), and 30th November, 1926 (*sic*), and the sum of Rs. 1,25,000 with interest thereon respectively." It was then provided that all the powers, provisions, covenants and agreements contained in the said three recited indentures of mortgage relating to the title or for securing the repayments of all moneys due thereunder or otherwise should extend to and be applicable for securing the further sum of Rs. 1,25,000 and all interest, costs, charges and expenses in the same manner in all respects as if the same powers, provisions, covenants and agreements were therein repeated with such alterations as would be necessary in consequence of the further advance of Rs. 1,25,000.

It is contended by the appellants that this mortgage of the 11th November, 1927, is a comprehensive mortgage of pro-

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perties *A*, *B*, *C* and *D* to secure the repayment of the four sums of 2 lacs, 1 lac, 1 lac and 1,25,000 of rupees and that the three earlier indentures no longer subsisted as separate and independent mortgages. Their Lordships are unable to accept this contention. The mortgage is in much the same form *mutatis mutandis* as the mortgages of the 30th November, 1925, and the 29th November, 1926; and their Lordships have already given their reasons for thinking that neither of these two mortgages put an end to the mortgage or mortgages that preceded them. The same sort of reasoning applies equally to the mortgage of the 11th November, 1927. This mortgage recites the three earlier mortgages and treats them as being on foot. Had the mortgagees sought to recover the moneys due under them they would have had to sue the mortgagor upon the covenants therein respectively contained. Such covenants had in no way been abrogated or replaced by any covenant for repayment contained in the fourth mortgage. The moneys secured respectively by the four mortgages were moreover repayable at different times and did not all carry interest at the same rate. It is almost inconceivable that if the intention of the parties had been to create a fresh and comprehensive mortgage on all the four properties to secure the sum of Rs. 5,25,000, the indenture of the 11th November, 1927, would have assumed the form that it did, even though the parties may have wished that the four items making up that sum should be repayable at different times and carry varying rates of interest. There would have been a new covenant for payment covering all four sums and a new charge of the entire sum on all the four properties *A*, *B*, *C* and *D*. It is, however, to be observed that the result of doing this and abrogating the existing mortgages on *A*, *B* and *C* would have been to give priority to any intermediate charge the mortgagor might, unknown to the appellants, have created upon those properties. To avoid this it was essential for the appellants to keep the three existing mortgages on foot, and this in their Lordships' opinion they successfully accomplished.

How material it is to arrive at a proper conclusion upon this point will become apparent at a later stage in this judgment. In the month of December, 1927, respondent No. 1 was desirous of paying off the appellants, and accordingly arranged that respondent No. 4 should advance him the sum of Rs. 7,25,000 on the security of properties *A*, *B*, *C* and *D* and certain other immovable properties of his. But though the

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dates fixed for repayment of the first three of the mortgages had passed, the repayment date provided in the fourth mortgage had not yet arrived. In these circumstances the respondent No. 1 by an indenture dated the 27th December, 1927, purported to grant and convey to the respondent No. 4, by way of mortgage, properties *A*, *B*, *C* and *D* and other the properties set forth in the schedule thereto to secure repayment of the sum of Rs. 7,25,000. In this mortgage the four previous mortgages to the appellants were recited, and then there followed a recital in these terms:—

"Whereas the said last mortgage of the eleventh day of November one thousand nine hundred and twenty-seven not having yet fallen due the mortgagor and the said Kumar Pasupathinath Maliah have requested the mortgagee to retain in his hands on account of the mortgagor out of the said sum of Rupees Seven Lacs and Twenty-five thousand the sum of Rupees One Lac and Fifty thousand to be held and applied by the mortgagee for and on account and on behalf of the mortgagor in payment of the said mortgage of the eleventh day of November one thousand nine hundred and twenty-seven as and when the same may fall due and to pay to the mortgagor at the execution of these presents the balance of Rupees Five Lacs and Seventy-five thousand with a view to enable him simultaneously therewith to pay off thereout the moneys under the said three several recited Indentures of mortgage of the eighth day of April one thousand nine hundred and twenty-four, thirtieth day of November one thousand nine hundred and twenty-five and the twenty-ninth day of November one thousand nine hundred and twenty-six."

This recital was substantially repeated in the operative part of the indenture which also contained a clause to the following effect:—

"It is hereby agreed and declared by and between the parties to these presents that upon payments of the amounts due to the said Raja Janaki Nath Roy and Jadu Nath Roy under the said several mortgages of the eighth day of April one thousand nine hundred and twenty-four, thirtieth day of November one thousand nine hundred and twenty-five, twenty-ninth day of November one thousand nine hundred and twenty-six and eleventh day of November one thousand nine hundred and twenty-seven respectively or any of them the Mortgagee will in addition to the security hereby created be also entitled to be subrogated to the position of the said Raja Janaki Nath Roy and Jadu Nath Roy notwithstanding that a Reconveyance or Reconveyances shall have been granted by the said Raja Janaki Nath Roy and Jadu Nath Roy in respect of the mortgage or mortgages paid off and such mortgage or mortgages shall be deemed to be kept alive for the benefit and protection of the mortgagee."

This indenture having been (or being about to be) executed a representative of respondent No. 4, together with a representative of respondent No. 1, called upon the first of the two appellants on the 27th December, 1927, and

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tendered him a cheque for the amount due under the first three mortgages. The said appellant was not at first willing to accept the money unless the amount which was owing but had not yet become payable under the fourth mortgage was paid at the same time. But on the next day, upon being made acquainted with the provision of the mortgage of the 27th December, 1927, relating to the payment of this last mentioned amount when it fell due, he withdrew his objection and he was then paid on behalf of himself and the other appellant the full sum due under the first three mortgages.

It has not, however, been proved that the appellants or either of them were at this time made acquainted with the provisions in the mortgage of the 27th December, 1927, as to respondent No. 4 being subrogated to the rights of the appellants under the first three mortgages.

For reasons into which it is not now material to inquire respondent No. 4 was not willing to pay off the remaining amount secured by the fourth mortgage when it fell due for payment on the 11th November, 1929, and such mortgage has accordingly never been discharged in full. In these circumstances the appellants on the 21st January, 1931, instituted the present suit for the purpose of enforcing their rights under the fourth mortgage. They impleaded as defendants the mortgagor respondent No. 1, and respondents 2 and 3 to whom respondent No. 1 had in the meantime assigned his equity of redemption. Taking the view that the only effect of the payments to them of the moneys due under the first three mortgages was to leave them in the position of first mortgagees of properties *A*, *B*, *C* and *D* for the amount still remaining due to them under the fourth mortgage, they also impleaded respondent No. 4 as a person who by reason of the mortgage in his favour of the 27th December, 1927, was entitled to redeem the fourth mortgage. They prayed a decree for the sum remaining due under the fourth mortgage and in default of payment a sale of properties *A*, *B*, *C* and *D*. The defence of respondent No 4 (the only defendant whose position has to be considered on this appeal) was, so far as is now material, that in the circumstances he was in the position of first mortgagee of the properties *A*, *B* and *C* as having been subrogated to the position of the appellants under the first three mortgages.

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The Subordinate Judge, however, decreed the suit. He thought that the fourth mortgage contained a contract to the contrary within the meaning of S. 61 of the Transfer of Property Act and that the appellants had a right of consolidation that was fatal to the contention of respondent No. 4. That being so, he said, the principle of subrogation "has no room to play." He nevertheless considered the law as to subrogation at some length, and came to the conclusion that it could not in any event have availed the said respondent inasmuch as (1) the first three mortgages had been paid off not by the said respondents but by the mortgagor and (2) that there could never be subrogation where a mortgagee is not paid off in full.

The matter then went to the High Court by way of appeal. The appeal was successful. The Court held that though by reason of the express contract contained in the fourth mortgage the appellants had not been deprived by S. 61 of a right to consolidate their mortgages, yet the doctrine of consolidation could not avail them inasmuch as at the date of the payment off of the first three mortgages the money due under the fourth mortgage had not then become payable. As to the question of subrogation they observed that the proposition laid down by the Subordinate Judge upon that point had not been supported in the arguments before them, but considered that the equitable right of subrogation was recognised in India. The High Court accordingly varied the decree of the Subordinate Judge by dismissing the suit against respondent No. 4 with costs there and below, by decreeing the suit against respondents 1 to 3 alone, and by ordering in default of payment of the sum decreed a sale of property *D* only.

From that judgment an appeal is now brought by the appellants to His Majesty in Council.

With all respect to the learned Judges in the Courts below, the doctrine of consolidation has nothing to do with the case. That doctrine can only apply where a mortgagee holds (say) a mortgage on property *A* and also a separate mortgage on property *B* belonging to the same mortgagor. In such a case after the expiry of the legal right of redemption the mortgagor in cases where the right of consolidation is still applicable is only allowed to exercise his equitable right of redemption of the one property on the terms of redeeming the other. In the case, however, of a mortgagee holding a first mortgage on property

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A and also a second mortgage on the same property the mortgagor cannot on payment off of the first mortgage redeem the property, that is to say, claim a reconveyance and delivery up of the title deeds, and so forth, unless he repays what is due on the second mortgage. But this is not because of the doctrine of consolidation but by reason of the fact that he has a second mortgage on the property.

Now on the 28th December, 1927, the position of the appellants in relation to properties *A*, *B* and *C* was that they were in effect first mortgagees of such properties to secure the sums advanced under the first three mortgages. But they also held a charge upon the properties to secure the sum advanced under the fourth mortgage, a sum, however, which had not then become due. In those circumstances they could not have refused to accept payment of the former sums when tendered. But the properties themselves could not be wholly redeemed because of the charge thereon of the sum advanced under the fourth mortgage, a position that was recognised by the express terms of that mortgage. This did not, however, in any way affect the right of a person other than the mortgagor himself on paying or providing for the payment of the sums due under the first three mortgages to be subrogated to the rights of the appellants under those documents.

In this connection reference must now be made to S. 92 of the Transfer of Property Act, of which the third and fourth paragraphs are in these terms:—

"A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such person shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full."

This section was inserted in the Act by the Amending Act 20 of 1929 and was not therefore in force in December, 1927, though there have been conflicting decisions in India upon the question whether or not the section has a retrospective effect. Their Lordships do not find it necessary to express any opinion upon this question, because whether the case now to be decided be governed by the section or by the law applicable in India before this section was passed, the respondent No. 4 is, in their Lordships' judgment, entitled to the right of subrogation that he claims.

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Taking first the law as it stood in December, 1927, it has nowhere been better expressed than it was by Mookerjee, J., in the case of *Gurdeo Singh* v. *Chandrikah Singh*[1]. That learned Judge said this (p. 217): "It may be said in general that to entitle one to invoke the equitable right of subrogation he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected." As already stated, respondent No. 4 in terms contracted with the mortgagor, that on payment off of the first three mortgages out of the money advanced by him he was to be subrogated to the rights of the appellants under those mortgages. Mookerjee, J., however, went on to point out that a person who claims to be subrogated to the rights of a mortgagee must pay the entire amount of the incumbrance in question. Payment of a portion only of the incumbrance is not sufficient. It is obvious, he said, that the contrary views would lead to endless difficulties. With these observations of the learned Judge their Lordships desire to express their entire agreement. It is indeed to be observed that such a qualification of the right of subrogation applies whether the right be claimed under the statute or under the pre-existing law.

Turning now to the statute the first thing to be observed is that the third paragraph of S. 92 only applies where the mortgage has been redeemed. In the present case it is said that the mortgage has not been redeemed inasmuch as there has been no reconveyance, or what in India takes the place of a reconveyance. This contention, however, loses sight of the distinction between the redemption of a mortgage and the redemption of the property mortgaged. In their Lordships' opinion it is clear that the words in the section "mortgage has been redeemed" refer merely to the payment off of the mortgage money and not to an extinction of the mortgagees' rights over the mortgaged property. If such rights had become extinguished there would be none to which the person advancing the money could be subrogated. The fourth paragraph moreover seems to contemplate that a mortgage may be redeemed in part, and this clearly shows that by redemption is meant no more than payment of the

1. (1907) I.L.R. 36 Cal. 193.

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mortgage money. That being so and the mortgage of the 27th December, 1927, having been duly registered, the respondent No. 4 is entitled to be subrogated to the rights of the appellants under the first three mortgages by virtue of the plain terms of S. 92 if such section be applicable. If it is not applicable, he has a conventional or contractual right to be so subrogated under the pre-existing law. But in neither case could he have been so subrogated if only a part of the moneys due under the incumbrances in respect of which he claims to be subrogated has been paid. Now it is contended by the appellants as to this that the result of the transactions between them and their mortgagor culminating in the mortgage of the 11th November, 1927, was as if there had been but one mortgage of the whole of the properties *A*, *B*, *C* and *D* for the total amount due on the whole of the mortgages, that is to say, that the fourth mortgage was a comprehensive mortgage of all the properties taking the place of and putting an end to the first three mortgages. If the appellants are right as to this they are entitled to succeed; for only part of the money secured by the fourth mortgage has been paid.

It was in order to ascertain whether this contention could prevail that their Lordships thought it necessary in the earlier part of this judgment to consider the provisions of the appellants' mortgages in some detail. Having done so and for the reasons there given their Lordships, as already stated, are unable to accept the appellants' contention upon this point.

Their Lordships are accordingly of opinion and will humbly advise His Majesty that both the appeal and the cross-appeal should be dismissed.

In the circumstances they think that the proper order to make as to costs is to direct the appellants to pay nine-tenths of the costs of respondent No. 4 of the consolidated appeals.

Solicitors for Appellants: *W. W. Box & Co.*

Solicitors for Respondents: *Hy. S. L. Polak & Co.*

R.C.C.
B.V.V. *Appeal and cross-appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Rukmani Ammal .. *Appellant** (*1st Defendant*)

v.

Subramania Sastrigal and another .. *Respondents* (*Plaintiffs*).

Rukmani Ammal *v.* Subramania Sastrigal.

Civil Procedure Code (V of 1908), O. 41, r. 6, sub-rule 2—Appeal pending against order for sale of immovable property in execution of decree—Application for stay of sale—If Court has discretion to grant or refuse stay—Refusal of stay—If illegality—O. 21, r. 64—Sale to be of property sufficient to realise amount due under decree.

Sub-rule 2 of r. 6 of O. 41 is quite clear that when an order has been made for the sale of immovable property in execution of a decree and an appeal is pending from such decree, the sale, shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of.

Babu Harnarain Sahi v. *Sadhu Govind Rai*, A.I.R. 1932 All. 551, dissented from.

The Court has no discretion in the matter of granting or refusing stay, though it has discretion in the matter of imposing terms. Refusal of stay and sale thereafter is a clear illegality and the sale must be set aside. Executing Courts have to note that O. 21, r. 64 provides that no more of the judgment-debtor's property ought to be sold than is sufficient to realise the amount due under the decree. It is also desirable to sell the property in small parcels if that will fetch a better price.

Appeal against the order of the Court of the Subordinate Judge of Trichinopoly dated 16th December, 1937 and made in E. A. No. 8 of 1935 in E. P. No. 350 of 1933 in O. S. No. 6 of 1927.

B. Sitarama Rao, R. Gopalaswami Aiyangar and *G. Thiagaraja Sastri* for Appellant.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Respondents.

The judgment of the Court was delivered by

Burn, J.

Burn, J.—This appeal is from an order of the learned Subordinate Judge of Trichinopoly in E. A. No. 8 of 1935 dismissing the appellant's application under O. 21, r. 90 and S. 47 of the Code of Civil Procedure to set aside a sale held in execution of the decree in O.S. No. 6 of 1927. The final decree in the suit was passed on 23rd February, 1933 and

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* A.A.O. No. 6 of 1938. 31st August, 1939.

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the sale was held on 28th November, 1934. Several irregularities were alleged on behalf of the judgment-debtor. The learned Subordinate Judge held that no irregularities had been made out and also held that the lands had been sold for reasonable prices and that therefore no substantial loss had been caused. He therefore dismissed the petition.

In appeal Mr. Sitarama Rao for the appellant has pressed before us strongly the contention that the sale was illegal. The sale was fixed for 21st November, 1934. On the 21st of November, 1934, the judgment-debtor put in an application under O. 41, r. 6, sub-rule (2) praying that the sale might be stayed for two months on the ground that appeals were pending against the final decree and from an order of the Court on the application to set aside the preliminary decree in the suit. The learned Subordinate Judge dismissed this petition on 28th November, 1934, and the sale was held on the same day. Mr. Sitarama Rao referring to the wording of O. 41, r. 6, sub-rule (2) contends that the Court has no option but to grant stay of sale on such terms as to giving security or otherwise as the Court thinks fit. We think that this contention is well founded. Mr. Krishnaswami Aiyar for the respondent has referred us to a decision reported in *Babu Harnarain Sahi* v. *Sadhu Govind Rai*[1]. In that case Mr. Justice Kendall expressed the opinion that sub-rule 2 of r. 6 does not impose on the Court which ordered the sale an obligation to stay the same merely because the property which is to be sold is immovable property. With all respect to the learned Judge we are unable to agree. Sub-rule 2 of r. 6 is quite clear that when an order has been made for the sale of immovable property in execution of a decree and an appeal is pending from such decree, the sale, shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of. We can see no justification for supposing that this rule means anything else than what it says. Mr. Krishnaswami Aiyar points out the danger that the judgment-debtor will be in a position to paralyse the executing Court, that he will be able to lie by until the last moment, then come up just when the sale is going to take place and get it stopped. We think there is sufficient answer to this

1. A.I.R. 1932 All. 551.

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in the provision that the Court may impose such terms as to giving security or otherwise as it thinks fit. If the Court thinks that the application has been designedly delayed, the Court can deal with it by prescribing conditions. If the judgment-debtor appears only on the morning to which the sale is posted, the Court has a discretion to say for example, that the sale will be stayed if the judgment-debtor produced the amount for which the sale is going to be held within half an hour or one hour. There is no limit to the discretion of the Court in imposing terms and that the Court is not without power to deal with a vexatious judgment-debtor in this way if the Court is obliged to stay a sale when such an application is made is quite clear from the terms of O. 41, r. 6, sub-rule (2). The learned Judge was therefore wrong when on 28th November, 1934, he thought he had discretion to stay or refuse to stay the sale. When the Code says the executing Court shall not sell in certain circumstances and the Court nevertheless proceeds to sell, the Court has committed in our opinion, what is more than an irregularity. It amounts clearly to an illegality. The learned Subordinate Judge ought to have imposed whatever terms he thought fit and if those terms were not complied with he could then have directed the sale to proceed. On this ground alone we think that this appeal must succeed. Moreover, we are of opinion that the learned Subordinate Judge acted unreasonably in declining any postponement of the sale. It was shown that the judgment-debtor had been appealing against earlier orders passed by the executing Court and had been applying to this Court to stay the sale and that her last application for stay had been dismissed on 20th November, 1934. In those circumstances it appears to us that the learned Subordinate Judge ought to have realised that there was no chance of selling this property to the best advantage since there must have been considerable uncertainty as to whether the sale would or would not be held at all. It would have been quite easy for the learned Subordinate Judge to prescribe conditions which would have been satisfactory to the decree-holder. It was shown that after the decree was passed the decree-holder realised Rs. 14,000 towards the amount of the decree by consenting to sales by the judgment-debtor to third parties. The learned Subordinate Judge might, for example, have prescribed that the judgment-debtor should pay, say, Rs. 20,000, within a month and there seems to be no reason to believe that the judgment-debtor would not

have been able to comply with some such condition as that. The learned Subordinate Judge was not, we think, justified in holding that the application to stay the sale was devoid of *bona fides* and was designed merely to cause delay.

Another irregularity which undoubtedly occurred in the proclamation of the sale was that the proclamation for the sale of lands in Athikudi was affixed to Survey No. 131/1, which was not an item of land proposed to be sold. In the circumstances of this case we do not consider that it was a material irregularity since there was another sub-division of the same survey number that was intended to be sold and we do not think that any intending bidder could have been misled by the mere affixing of the proclamation to a pole planted in Survey No. 131/1.

A more serious objection that Mr. Sitarama Rao has pressed before us is that the lower Court failed to consider the question whether it would not be better to sell the lands in small lots rather than in large lots. The extent sold was 67 acres in the village of Peruvalanallur (53·12 acres of nanja and 13·93 acres of punja) and 29 acres in Athikudi (21·95 acres of nanja and 7·26 acres of punja). The whole of the land in Peruvalanallur was sold as one lot and realised Rs. 60,000. The whole of the land in Athikudi was sold in another lot and realised Rs. 30,600. The judgment-debtor was contending from the beginning of the execution proceedings that the sale ought to be in small parcels and it appears that in April 1934 the learned Subordinate Judge directed the decree-holder to put in an estimate of the value of each item of the lands to be sold "in case the properties have to be sold in various lots." But when the proclamation came on to be settled in September 1934 the learned Subordinate Judge has recorded that the only point for determination was whether the prices given by the decree-holder should be accepted. This, of course, was incorrect because he had also to determine the other point which was still pressed by the first defendant that the properties ought to be sold in small parcels. We think this is a matter of importance because it is obvious that there are not many persons likely to bid for 67 acres of land at a time or for 29 acres. There must be a much large number of persons who are in a position to bid for parcels consisting of 1, 2, 3, 4 or 5 acres. Mr. Krishnaswami Aiyar for the respondent has endeavoured to

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persuade us that the learned Subordinate Judge had considered this point but we think it is quite clear from the terms of the order on 18th September, 1934, that he did not consider it at all. If he had considered it, it would be difficult to say that the sale in two lots instead of a large number of lots by itself constituted an irregularity. But we think there is good reason to believe that the sale in two lots has caused the prices realised to be less, considerably less, than they otherwise would have been. It is no doubt the case that the value of land was declining between 1929 and 1934. But we do not see reason to believe that it declined by so much as 50 per cent. There was very good evidence to show that nanja lands of similar situation and quality to those sold fetched over Rs. 2,000 per acre in 1929. There was some evidence about the sales of nanja lands both in Peruvalanallur and Athikudi even up to 1933 in which prices of nearly Rs. 2,000 per acre were realised. The prices actually fetched at the sale are approximately Rs. 1,000 per acre. It seems probable that if sold in small lots better prices could have been obtained.

Another objection taken by Mr. Sitarama Rao for the appellant was with regard to the misdescription of certain items of dry lands. For example Survey No. 140/1 in Athikudi was described as punja but as a matter of fact it consisted of a tope containing a large number of mango and cocoanut trees. Survey No. 249/21 was a similar tope. It was alleged that both these topes were close to house sites and could have been sold as building sites for a great deal more than their value as mere dry lands. Survey No. 22/3 it was shown contained a large number of clusters of bamboos. The attention of the executing Court was invited to these matters in April 1934 and in September when the terms of the proclamation were being drawn up the judgment-debtor reiterated the contentions raised by her in April. It has often been pointed out that the duty of drawing up the proclamation is the duty of the Court. Therefore it is no answer to these objections to say that the decree-holder is free from blame or has acted *bona fide*. These misdescriptions are clearly irregularities which would be very likely to affect the prices realised. They come within O. 21, r. 66 (2) (*e*) being matters which the Court should bring to the notice of possible purchasers in order to enable them to judge the probable value of the property.

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For these reasons we think this appeal must be allowed and the sale must be set aside. The appellant will recover her costs from the respondent.

In reselling the property we desire to invite the attention of the executing Court in particular to O. 21, r. 64 from which it is clear that no more of the judgment-debtor's property ought to be sold than is sufficient to realise the amount due under the decree. This has a bearing upon the desirability of selling the property in small parcels a subject we have already dealt with.

The case having been set down to be spoken to this day, the Court made the following

ORDER.—We intended the appellant to recover costs both in the Court below and here.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Yarlagadda Venkatasubbayya .. *Appellant* (Plaintiff).*

v.

Gajjala Satyanarayanamurty and others .. *Respondents (Defendants).*

Venkatasubbayya v. Satyanarayanamurthy.

Principal and agent—Contract to sell goods—Purchase by agent of goods—Principal advancing money for cover against agent's possible loss—Pledge by agent of goods without authority of principal—Whether conversion in law—Repudiation of contract by principal—Claim of agent to be paid purchase money according to original agreement—How far justifiable in the circumstances.

Where the appellant, a groundnut merchant, entered into an agreement with the respondent, a firm of business agents, whereby they were to purchase groundnuts and sell the same as per instructions of the appellant, stocking them in the meanwhile in their godowns, and the appellant advanced some amount as cover against any possible loss on the understanding that whenever the goods were sold the respondents were to deduct the purchase money paid by him less that advance received from appellant, with interest as well as godown rents and commissions agreed to be charged and pay the balance, if any to the appellant; but, however, owing to financial embarrassment the respondent pledged the goods as well as other goods with a Bank for obtaining a loan and in course of time redeemed them also; and as the respondents received no instructions from appellant they wrote a letter to him to pay them the amounts due and take back the goods to which appellant replied repudiating the contract referring to a settlement between the parties, and treating this letter as a repudiation of the contract, the respondents sold the goods and claimed, as per the original understanding mentioned above, for the balance after deducting the advance sum, etc.,

*S. A. Nos. 602 and 603 of 1936. 8th December, 1939.

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Held, (1) that there could be no conversion in law, as contended for by the appellant, by the pledge of the goods with a bank by the respondents without the authority of the appellant, because there could be no question of conversion by the party in respect of a property, title to which still remained vested in him.

Bowstead on Agency (Art. 76) relied on.

(2) Since the respondent by reason of his having purchased the goods on his own responsibility, though on account of the appellant, was *vis a vis* the latter, in the position of an unpaid vendor with a right to retain the goods until payment of the balance of the purchase money, so the appellant was not entitled to possession of the goods even if the respondent, notwithstanding the non-payment of the balance of the purchase money, had intended that the property in the goods should pass to the appellant, of which there was absolutely no evidence in the case.

Lord v. *Price*, (1874) L.R. 9 Ex. Cas. 54, relied on.

Appeals against the decrees of the Court of the Subordinate Judge, Masulipatam, in A. S. Nos. 56 and 57 of 1935 respectively preferred against the decrees of the Court of the District Munsiff of Masulipatam in O. S. Nos. 17 and 81 of 1934.

A. Lakshmayya for Appellant.

P. Somasundaram and *P. Suryanarayana* for Respondents.

The Court delivered the following

JUDGMENT.—These two connected second appeals arise out of a suit and a cross-suit brought in the District Munsif's Court, Masulipatam. O. S. No. 17 of 1934 was a suit by the appellant for an account of dealings in groundnut with the respondents, a firm of Commission Agents and O. S. No. 81 of 1934 was by the Commission Agents against the appellant for recovery of Rs. 856-7-0 said to be due to them on those dealings. The question for determination in both the suits being the same, they were heard and disposed of together by a common judgment in both the Courts below. Both the suits having been decided against the appellant in the lower appellate Court, he has preferred these appeals. As the first respondent has been the principal contesting party throughout, he is hereinafter referred to as the respondent.

The facts of the case may be briefly stated. The appellant who is a groundnut merchant entered into an agreement in October, 1932, with the respondent whereby he was to purchase groundnuts and sell the same as per instructions of the appellant, stocking them in the meanwhile in godowns which he rented for the purpose. The appellant advanced Rs. 1,000 as cover against any possible loss that might result from the transaction. The respondent was to purchase the groundnuts in

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the market advancing the purchase money himself or making himself personally responsible for the purchase mone y to the vendors. When the goods were sold, the respondent was to deduct the purchase money paid by him less the advance received with interest as well as godown rents and commission at the agreed rate and pay the balance of the proceeds, if any, to the appellant. Purchases were made in pursuance of this agreement in November and December, 1932 and the goods were stocked in a godown. On 1st March, 1933, however, owing to financial embarrassment, the respondent pledged these goods as well as other goods with the Andhra Bank, Ltd., at Masulipatam and obtained a loan. This loan was repaid and the pledge redeemed some time in May, 1933. It is in evidence—and it was not disputed—that the market began to decline from January, 1933. The appellant did not send any instructions to the respondent to sell the goods till September, 1933, when the respondent wrote Ex. III to the appellant calling upon him to pay the amounts due to him and take the goods. As there was no reply, he wrote another letter (Ex. III-A) to the same effect on 19th October, 1933. To this letter, the appellant sent a reply (Ex. X) dated 20th October, 1933 in which he stated that on coming to know of the pledge of the goods by the respondent, he had raised objection and that the respondent had then agreed to take the groundnuts himself and settle the account by paying the appellant Rs. 3-2-0 a bag. The appellant thus repudiated the claim made by the respondent in Ex. III and III-A and, in turn, called upon him to pay the amount due to the appellant at Rs. 3-2-0 a bag in accordance with the settlement referred to above. The respondent treated this letter as a breach of the contract by the appellant and sold the goods and after giving credit to the sale proceeds and the original advance received, claimed a sum of Rs. 856-7-0 as due to him in O. S. No. 81 of 1934 while the appellant claimed in his suit O. S. No. 17 of 1934 an account of the dealings on the basis of the agreement which he put forward in his letter (Ex. X). The lower appellate Court found that the agreement put forward by the appellant was not true and, as stated above, rejected his claim and decreed that of the respondent.

The appellant's learned counsel did not contest—as indeed he could not in second appeal—the finding of the lower appellate Court that there was no settlement between the parties in March, 1933, as alleged by the appellant. But the learned

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Counsel argued as a matter of law that the respondent's pledge of the goods purchased by him on account of the appellant without the latter's authority amounted to a conversion of the goods and that the respondent was therefore liable to pay damages for conversion according to the rates prevailing in the market at the time of the pledge. This contention cannot be accepted for two reasons, first, the respondent having himself advanced the purchase money in respect of the goods purchased by him on account of the appellant, the property in the goods cannot be said to have passed to the appellant until the amount advanced by the respondent for the purchase of the goods is paid to him. The law is thus stated in Bowstead on Agency:—

"Where an agent, by contracting personally renders himself personally liable for the price of goods bought on behalf of his principal, the property in the goods, as between the principal and agent, vests in the agent, and does not pass to the principal until he pays for the goods, or the agent intends that it shall pass, and the agent has the same rights with regard to the disposal of the goods, and with regard to stopping them in *transitu* as he would have had if the relation between him and his principal had been that of seller and buyer" (Art. 76).

In this view, the correctness of which has not been disputed, the very foundation of the appellant's contention fails, as obviously, there could be no question of conversion by the respondent in respect of property title to which still remained vested in him.

Secondly, it is well established that to entitle a person to claim relief on ground of conversion or trover, he must show not only title to the property concerned but also a right to the present possession thereof. But one who has not paid the purchase money in respect of goods purchased by him has no right to claim possession of the goods before paying the whole of the purchase money due as the seller has a lien on the goods for the unpaid purchase money. It has thus been held in *Lord v. Price*[1], that a purchaser of goods which continued in the possession of the vendor subject to his lien for unpaid purchase money cannot sue a third person for a conversion of the goods. The plaintiff there purchased two lots of cotton at an auction sale but paid only the deposit required and so had to leave the cotton in the field where the auction had been held. One of the lots was removed by mistake by the defendant who had also bought some lots at the sale and the plaintiff brought the action for damages for conversion. The Court of Exchequer held

1. (1874) L.R. 9 Ex. Cas. 54.

Venkata-subbayya v. Satya-narayana-murty.

that the plaintiff not having paid the residue of the purchase money had no right of present possession in respect of the goods purchased by him, such right being still in the vendor by virtue of his lien and that therefore the plaintiff was not entitled to maintain an action for the tortuous removal of the goods. Now, according to the authority cited above, the respondent by reason of his having purchased the goods on his own responsibility, though on account of the appellant was, *vis a vis* the latter, in the position of an unpaid vendor with a right to retain the goods until payment of the balance of the purchase money. The appellant was not therefore entitled to possession of the goods even if the respondent, notwithstanding the non-payment of the balance of the purchase money, had intended that the property in the goods should pass to the appellant of which, however, there is absolutely no evidence in the case.

The learned Counsel for the respondent also contended that the respondent must be deemed to be a tacit pledgee, having paid the purchase money for the goods out of his own pocket, and was therefore entitled to repledge the goods and relied upon *Bar Dukan* v. *Gopal Singh*[1], while the learned Counsel for the appellant challenged that position on the authority of, *Firm Tejpal Jamna Das* v. *David*[2]. It is unnecessary however, to consider this point as the appeals fail on the other grounds indicated above.

Both the appeals are therefore dismissed. The appellant will pay the costs of the first respondent in S. A. No. 602 of 1936. No order as to costs in S. A. No. 603 of 1936.

Leave refused. *Appeals dismissed.*

K. C.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Rm. L. M. L. V. Alagammai Achi and another .. *Appellants* (Plaintiffs 1 and 2)*

v.

Vr. Pl. M. Palaniappa Chettiar and another ... *Respondents (Defendants 2 and 3).*

Alagammai Achi v. Palaniappa Chettiar.

Hindu Law—Joint family business—Liability of co-parcener taking part in business—Nature and extent—Test.

1. A.I.R. 1928 Lah. 747.
2. (1928) 32 C.W.N. 1146: 28 L.W. 204 (P.C.).

*Appeal No. 17 of 1937. 15th January, 1940.

Alagammai Achi v. Palaniappa Chettiar.

The question, whether a coparcener who takes part in the conduct of the family business is personally liable and if so on what legal basis, is essentially one of fact depending for its decision upon the nature and extent of participation as disclosed by the evidence in the particular case. If what the junior member is shown to have done in relation to the business is nothing more than what can reasonably be attributed to his interest in the business as a member of the family, there will be no legitimate inference that he intended to undertake a greater liability as a partner in the business. If the part taken by such member in the management of the business goes beyond what can be sufficiently explained by his interest in it as an asset of the family, as for instance when he joins in borrowing for the purposes of the business, it may afford ground for the conclusion that he has become a partner so as to be personally answerable for all debts incurred in the course of the business including those which he did not join in borrowing. No partnership relation can be implied, from participation, however active in the conduct of the family business, in the absence of definite and unequivocal consensual acts on the part of the coparcener.

Case-law examined.

Appeal against the decree of the Court of the Subordinate Judge of Sivaganga dated 1st August, 1936, in O.S. No. 49 of 1934.

K. S. Sankara Aiyar for Appellants.

N. G. Krishna Aiyangar for Respondents.

The judgment of the Court was delivered by

Patanjali Sastri, J.

Patanjali Sastri, J.—This appeal arises out of a suit brought by the appellant for recovery of Rs. 5,982-14-9 from defendants 1 to 3 personally and from the family properties of all the defendants. The first defendant is the father of defendants 2 to 4 and the fifth defendant is the son of the first defendant's deceased brother. The defendants constitute a joint Hindu family of which the first defendant is the manager. The defendants are Nattukottai Chetties and were carrying money lending and banking business under their family *vilasam* V. R. Pl. M. at Rangoon and other places in Burma. The amount claimed is said to be the *stridhanam* money of the first plaintiff deposited by her father the second plaintiff with the first defendant. The Court below decreed the claim against the first defendant personally and against the family properties of all the defendants as it was a debt contracted by the first defendant in the course of the family business. Not satisfied with this decree, the plaintiffs have appealed claiming a personal decree also against defendants 2 and 3, the respondents herein, and the only question for decision relates to their personal liability.

Such liability is said to arise on the ground that, as sons of the first defendant, they were managing the family business

jointly with him and must, by virtue of such participation in management, be deemed to have become partners. A special ground of liability was also urged so far as the first respondent was concerned, namely, that he had expressly undertaken to pay the debt personally in certain letters written by him to the second appellant. The learned Subordinate Judge found that all that was established by the appellants was that the first respondent was managing the business under a power of attorney dated 13th July, 1931, executed in his favour by his father for a period of three years thereafter, and that the second respondent was writing the accounts of the firm for some time and held, on these findings, that the respondents could not be said to have become partners or to have held themselves out as such, so as to be personally liable for the debts incurred in the course of the business. The learned Judge said nothing about the special ground urged as regards the first respondent, as the point was apparently not raised before him.

Some criticism was directed against the finding that the first respondent was managing the firm under a power of attorney executed by the first defendant, and it was pointed out that the power of attorney was not produced by the respondents. We are not prepared to attach any importance to the non-production of the power as the appellant's own witness (P.W. 2) who was the agent of another Chettiar firm in Rangoon which had dealings with the respondents' firm, admitted that the first respondent was acting under a power executed by his father when he was managing the family business in Burma. But this is not, in our view, a material circumstance, for, we are clearly of opinion that even if he managed the firm in his capacity as a junior member of the family interested in the business, no personal liability could arise by virtue of such management in the circumstances of this case. For, the deposits to which the suit relates were all made prior to 10th December, 1924 and duly stamped vouchers evidencing the terms of the deposits including the final deposit letter (Ex. A dated 11th December, 1930) on which the suit was brought, were all executed from time to time only by the first defendant, before the respondents began to participate in the conduct of the business in 1931. Assuming, therefore, that the respondents must be deemed to have become partners or to have held themselves out as such in relation to the family business in Burma by reason of

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such participation, they could not, in our opinion, be held to be personally liable in respect of the *pre-existing* debts of the firm.

On the question of personal liability of junior members of a joint Hindu family for debts incurred in the course of family business on the ground of their participation in the conduct or management of it, the decisions of this Court, to go no further, have been neither clear nor uniform. In *Official Assignee of Madras* v. *Palaniappa Chetty*[1], it was held by Wallis, C.J. and Spencer, J., that the fact that the son had been assisting the father in the conduct of the business during his minority and had taken an active part in its management after attaining majority, did not make the son personally liable for obligations contracted during his minority, but that in respect of debts incurred since he attained majority such liability arose by reason of his conduct in taking an active part in the business. Both the learned Judges were of opinion that Ss. 247 and 248 of the Indian Contract Act did not apply to the case and based their conclusion apparently on the principles of Hindu Law. Sadasiva Aiyar, J., held that both by virtue of those sections and the rules of Hindu Law, the son was personally liable for all the debts of the business including those contracted during his minority. This extreme view has never been followed in this Court and may be left out of consideration. The other two learned Judges, however, have not clearly indicated on what legal basis personal liability in such a case rests—whether it is based on implied partnership or estoppel by holding out or ratification. In *Ramaswami Chettiar* v. *Srinvasa Aiyar*[2], the view is expressed that personal liability, where it arises in such cases, rests on the doctrine of holding out and that, "a partnership from the point of view of the general public comes into existence." It is, however, somewhat difficult to see how the rule of estoppel which can only preclude proof of facts as against individuals actually misled, can give rise to a partnership quoad the 'general public'.

On the other hand, in *Sitharama Chettiar* v. *Sivagurunatha Chetty*[3], it was thought that, according to the majority view in *Official Assignee of Madras* v. *Palaniappa Chetty*.[1]

1. (1918) 35 M.L.J. 473: I L.R. 41 Mad. 824 (F.B.).
2. (1935) 70 M.L.J. 214.
3. (1930) M.W.N. 371.

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"Unless they (that is, the junior members of the family) were partners, they cannot be made personally liable for the debts of the business"

and the case was sent down to the lower Court for a finding on that point. That Court having found that the junior members had taken an active part in the management of the family business, the case came up again before Coutts-Trotter, C.J. and Ramesam, J., who, however, would seem to repudiate the doctrine of personal liability of a coparcener arising out of an active participation in the family business, and refused to hold the junior members personally liable in the absence of

"any other evidence of a consensual act whereby a definite new relation other than that of members of a joint Hindu family trading together was created." (*Sitharama Chettiar* v. *Sivagurunatha Chettiar.*)[1]

It seems to us however that this divergence of opinion is more apparent than real, for, we venture to think that the whole question whether a coparcener who takes part in the conduct of the family business is personally liable, and, if so, on what legal basis, is essentially one of fact depending for its decision upon the nature and extent of participation as disclosed by the evidence in the particular case. If what the junior member is shown to have done in relation to the business is nothing more than what can reasonably be attributed to his interest in the business as a member of the family, there will be no legitimate inference that he intended to undertake a greater liability as a partner in the business. This is all, as it seems to us, that the learned Judges meant to affirm in the last mentioned case. On the other hand, if the part taken by such member in the management of the business goes beyond what can be sufficiently explained by his interest in it as an asset of the family, as for instance, when he joins in borrowing for the purposes of the business, it may afford ground for the conclusion that he has become a partner so as to be personally answerable for all the debts incurred in the course of the business including those which he did not join in borrowing. Without such definite and unequivocal consensual acts, no partnership relation between members of a joint family can, in our opinion, be implied from participation, however active, in the conduct of the family business, a position which has received additional emphasis from the provisions of S. 5 of the Indian Partnership Act which postulate the possibility of members of a joint family *carrying*

1. (1930) M.W.N. 371.

Alagammai Achi v. Palaniappa Chettiar.

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on the family business without becoming partners therein in the legal sense of the term. Again, the part taken by a junior member, while it may not be sufficient to justify an inference of partnership, may be such as to lead others to act on the belief that he is a partner, in which case the member will be precluded by the principle of estoppel from showing as against the person misled that he (the member) is not in fact a partner. Thus in each case, the question is, as it seems to us, what is the proper inference to be drawn from the facts proved, and as pointed out by Varadachariar, J., in *Alagappa Chettiar* v. *Bank of Chettinad*[1], the extent of the personal liability incurred by the member will vary according as it is found to arise on the one ground or the other. But what is important for the purpose of this appeal is, that such liability does not extend, in either case, to antecedent transactions. As observed by the same learned Judge in the case referred to above:

"If the liability is to be based on the doctrine of holding out it is obvious that such liability can arise only in respect of transactions subsequently entered into and on the faith of his conduct. Even if it should be held that by such participation the coparcener becomes a partner in the business, t seems to us unreasonable to hold that he thereby incurs a personal liability in respect of the pre-existing debts of the business." (See also *Russa Engineering Works* v. *The Kanara Transport Co.*[2]) :

The appellants next relied on the following observations in *Chelamayya* v. *Varadayya*[3]:

"No doubt where it is shown that the contract relied on, though purporting to have been entered into by the manager only, is in reality one to which the other coparceners are actual undertaking parties either because they had agreed, before the contract was entered into, to be personally bound thereby, or because they, being in existence at the date of the contract and competent to enter into it, have subsequently duly ratified and adopted it, in that case unquestionably every such coparcener is absolutely responsible. Equally he would be responsible though he did not assent to the particular contract if there had been such acquiescence on his part in the course of dealings, in which the particular contract was entered into, as to warrant his being treated in the matter as a contracting party."

Appellants accordingly urged that the respondents must be taken by reason of their participation in the business to have "ratified and adopted" even the antecedent transactions in the business including the suit deposit and that, in any case, there

1. (1938) 2 M.L.J. 944 at 954.
2. (1926) 51 M.L.J. 506: 49 Mad. 930.
3. (1898) 9 M.L.J. 3: I.L.R. 22 Mad. 166 (167).

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has been such "acquiescence" on the part of the respondents in the course of the dealings had by the father as to warrant the respondents being regarded as contracting parties themselves in respect of the suit deposit. Our attention was also drawn to the approval by Varadachariar, J., of *Alagappa Chettiar* v. *Bank of Chettinad*[1] already referred to, of the observations in *Chelamayya* v. *Varadayya*[2] quoted above. There is nothing in those observations which need arouse any dissent, for, they do no more than envisage the possible application of the general principle of ratification by adoption or acquiescence to this class of cases. The principle itself is simple and well-known, but the difficulty arises, as with so many other principles, in the application. In holding a junior member of a family personally liable for a contract purporting to have been entered into by the manager on the ground of *ratification,* it is important to bear in mind that the doctrine pre-supposes ability to adopt or repudiate the transaction in question and cannot properly be applied for this reason to dealings or transactions which under the Hindu Law the coparceners are powerless to disown, so long as they continue to remain in the joint family. As pointed out in the very case in which these observations occur, when

"the contract is of a character such as under the Hindu Law to entitle the manager to enter into *independently of the consent of the other members of the family so as to bind them thereby,* then it is clear that the scope of the manager's power is restricted to and does not extend beyond the family property." (Italics ours.)

It would be wholly subversive of this well-established rule of Hindu Law to hold that a coparcener is personally liable on the ground of ratification by acquiescence for the dealings of the manager in the ordinary course of family business. If it had been shown in this case that the first defendant pledged the individual credit of the respondents at the time when he received the deposits in question and that the respondents having come to know of the transaction accepted or acquiesced in it, it might be possible to hold them personally bound on the principle of ratification; but nothing of the kind has been proved or even suggested in this case. We have therefore no hesitation in rejecting this contention.

It remains to consider the special ground of liability urged with reference to the first respondent, namely, a personal under-

1. (1938) 2 M.L.J. 944 at 955 and 956.
2. (1898) 9 M.L.J. 3: I.L.R. 22 Mad. 166.

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taking to pay in consideration of the appellants' forbearance to sue. Reliance was placed upon Exs. J, J-1 and D to show that when the second appellant demanded the money and threatened to sue, the first respondent wanted time for payment promising to pay the debt personally and that in consequence the filing of the suit was delayed for over a year. We are unable, however, to read these letters as containing any undertaking by the first respondent to pay the debt due to the appellants personally. The letters merely explained why there was delay in the payment of the debt and gave an assurance that as soon as conditions of trade improved, arrangement would be made to pay up the debt.

Though written by the first respondent, the letters bore only the family *vilasam* V. R. Pl. M. and were signed with an invocation of the family deity, the mode usually adopted for signing family letters in accordance with the practice prevailing among Nattukottai Chetties. The letters are thus consistent with the first respondent having merely affirmed the pre-existing liability of the family such as it was, and contain no indication of his having undertaken any additional or extended liability for the debt. Nor is there any definite request in any of them for grant of time for payment. The suit was, no doubt, brought more than a year after the latest of them, namely, Ex. D, but it does not appear that this delay was due to the appellants having granted any time for payment. The second appellant who was examined as P. W. 1 does not say that time was granted in compliance with the request of the first respondent, nor was such a thing suggested in the cross-examination of the first respondent. On the other hand, the allegations in paragraph 7 of the plaint that:

> "On several dates after the said date (that is, after Ex. D) both personally and through agents demands were made on the defendants and a demand was made lastly on 30th June, 1934, all to no purpose."

are plainly destructive of any such suggestion.

The appeal fails and is dismissed with costs.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Arunachala Mudali .. *Petitioner** (*Petitioner-Decree-holder*)

v.

Raghava Pillai .. *Respondent* (*Respondent-Judgment-debtor*).

Arunacha Mudali *v.* Raghava Pillai.

Civil Procedure Code (V of 1908), O. 21, r 13—Application for attachment of immovable property—Necessity to contain description sufficient to identify it.

An application for attachment of immovable property which does not contain a description sufficient to identify it is not one in accordance with law.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the order of the Court of the District Munsif of Tindivanam dated 20th October, 1936 and made in E. P. No. 1340 of 1936 in S. C. S. No. 336 of 1924.

T. E. Ramabhadrachariar and *K. Rama Aiyangar* for Petitioner.

T. R. Srinivasan for Respondent.

The Court delivered the following

JUDGMENT.—O. 21, r. 13, Civil Procedure Code, says that an application for attachment of any immovable property *shall* contain a description of the property sufficient to identify the same. The application dated 12th August did not contain any description of the property to be attached and although the decree-holder was given an opportunity of supplying it, he failed to do so. The application was not "in accordance with law" when it was presented, and as it was not amended within the time allowed no question of "deeming it" to have been in accordance with the law [O. 21, r. 17 (2)] arises.

This application is dismissed with costs.

K. S. *Petition dismissed.*

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* C. R. P. No. 159 of 1937. 14th December, 1939.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Neelakantan Nambisan .. *Petitioner.**

Neelakantan Nambisan, *In re.*

Indian Companies Act (VII of 1913), S. 277-L—Default by directors in maintaining requisite cash reserve—Ordinary director not knowingly and wilfully a party to the default—Conviction under S. 277-L—Propriety.

Where the evidence does not warrant the conclusion that an ordinary director was knowingly and wilfully a party to the default to maintain the requisite cash reserve, a conviction of such director under S. 277-L of the Indian Companies Act must be set aside.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Palghat dated 31st August, 1939, in C. C. No. 7 of 1939.

T. K. Raman Nambisan for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

The Court made the following

ORDER.—The petitioner was an ordinary director and the evidence does not warrant the conclusion that he was knowingly and wilfully a party to the default to maintain the requisite cash reserve. The conviction under S. 277-L of the Indian Companies Act is therefore set aside and the fine if levied will be refunded.

K. S. *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Venkataramasastri .. *Appellant† (Plaintiff and 1st Respondent)*

v.

Venkatasubramania Dikshitar and another .. *Respondents (Defendants 1 and 4—Appellant and 2nd Respondent).*

Venkataramasastri *v.* Venkatasubramania Dikshitar.

Court-Fees Act (VII of 1870), Ss. 10 (2) and 12 (2)—Order on plaintiff-respondent to pay deficit court-fee which ought to have been paid in the Court below—Default—Applicability of Ss. 12 (2) and 10 (2).

In an appeal the respondent who was the plaintiff was directed to pay the deficit court-fees on the plaint and in default the suit was directed to be

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* Crl. R. C. No. 1002 of 1939. (Crl. R. P. No. 942 of 1939). 2nd February, 1940.

† S. A. No. 801 of 1938. 15th December, 1939.

Venkata-ramasastri *v.* Venkata-subramania Dikshitar.

dismissed under S. 10 (2). It was contended that the provisions of S. 12 (2) applied only to cases where the plaintiff is the appellant.

Held, that in applying S. 10 (2) to appeals and reading it with S. 12 (2) the word 'suit' should be deemed to include 'appeal'. Moreover the actual wording of S. 12 (2) shows that the appeal is considered as an extension of the suit.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge of Vellore in A. S. No. 94 of 1937 preferred against the decree of the Court of the District Munsif of Tiruvannamalai in O. S. No. 779 of 1935.

V. Govindaraghavachari and *V. V. Raghavan* for Appellant.

A. Viswanatha Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff, who is the appellant in this Court, brought a suit on insufficient court-fee and he was granted a decree. The defect was not noticed during the course of the trial. In appeal to the Court of the Subordinate Judge of Vellore, he was called upon to pay the deficient court-fee under S. 12 of the Court-Fees Act and as he did not do so within the time allowed, S. 10 (2) was applied and his suit dismissed. This second appeal has, therefore, been preferred, the plaintiff contending that S. 12 of the Court-Fees Act does not apply to his case.

The argument of the learned advocate for the plaintiff in this Court is that S. 12 (2) only applies to cases where the plaintiff is the appellant. This sub-section runs:

"But whenever any such suit comes before a Court of Appeal . . . . . . if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided"

If this sub-section had ended with the word "decided", I am quite sure there would never have been any doubt at all that it applies to all the parties to the appeal. Its provisions are very wide and it definitely refers to the party by whom the fee has been paid. If this sub-section has been intended to apply only to a case where the deficiency was by the appellant, it would not have been necessary to say "the party by whom such

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fee has been paid." The simple word "appellant" would have been sufficient. A doubt has however arisen because of the last few words of the sub-section "and the provisions of S. 10, para. 2 shall apply". S. 10, para. 2 applies only to suits. It is argued that if the word "appeal" replaces the word "suit" in S. 10 (2), then the appeal would have to be dismissed, which would work a grave injustice on the appellant when the respondent is the defaulter. That was the reasoning that impressed the learned Judge who decided *Narain Singh* v. *Chaturbhuj Singh*[1]. The matter came before a Full Bench of the Allahabad High Court in *Mohan Lal* v. *Nand Kishore*[2], where the argument of *Narain Singh* v. *Chaturbhuj Singh*[1] was adopted. It was therefore held that S. 12 (2) could not apply to cases where the plaintiff was not the appellant and that there was therefore no provision in the Court-Fees Act for the recovery of deficient court-fee from a plaintiff-respondent. What a Court could do, the learned Judges said, was to suspend the execution of the decree until the deficit court-fee was paid. The difficulty of that course is that it would be in the interests of a plaintiff who has made default in the payment of proper court-fee to await the result of the appeal. If he was unsuccessful in the appeal, then obviously he would certainly not pay court-fee. This difficulty was seen in *Baijnath* v. *Dhani Ram*[3] and the learned Judges there held that the course suggested in the earlier Allahabad cases was not the only one. If the plaintiff did not pay the deficit court-fee when called upon to do so by the appellate Court, a contempt of Court was committed and the appellate Court could therefore refuse to hear the respondent or his advocate and dispose of the appeal in his absence.

There is no authority in any of the Codes (or previously reported decisions as far as I know) for the adoption of the procedure suggested in these cases. S. 12 (2), except for the last few words, provides no difficulty at all; and the sub-section clearly enough applies to all cases where a deficient court-fee has been paid in the first Court, whether by the appellant or by any other party. Is it possible that because of some little difficulty in applying the wording of S. 10 (2) to appeals by a

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1. (1898) I.L.R. 20 All. 362. 2. (1905) I.L.R. 28 All. 270 (F.B.).
3. (1929) I.L.R. 51 All. 886.

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defendant, the rest of the section is nullified and can have no application at all to cases where the plaintiff is not the appellant? Where a section primarily intended to apply to suits is also to be applied to appeals, the ordinary canon of construction is that the necessary changes in wording should be made so as to make the section good sense. If that is done, I do not think there is any difficulty in understanding S. 10 (2). Several decisions of other High Courts have been quoted in which the Allahabad decisions have been dissented from. *Brij Krishna Das* v. *Murli Rai*[1], was a Bench decision of the Patna High Court. *Dyal Singh* v. *Ram Rakha*[2] is a Full Bench decision of the Punjab Chief Court. *Shama Soondary* v. *Hurro Soondary*[3] is a Bench decision of the Calcutta High Court. *Ram Nidh* v. *Balkaran Singh*[4], is a decision of a single Judge of the Oudh Chief Court. In all these cases the Allahabad decisions have been dissented from; and it was held that in applying S. 10 (2) to appeals and reading it with S. 12 (2) the word "suit" should be deemed to include "appeals". If this is done, there is no difficulty in interpreting the section. It has been pointed out that in *Subbaiya Pandaram* v. *Mahamad Mustapha Maracayar*[5], a single Judge of the Patna High Court followed the Allahabad decisions. He did so, however, without discussing the matter in question here and that decision cannot be good law in Patna in view of the Bench decision in *Brij Krishna Das* v. *Murli Rai*[1]. It has been moreover pointed out by Mr. Visvanatha Aiyar for the respondents that the actual wording of S. 12 (2) shows that the appeal is considered as an extension of the suit for the sub-section begins "But whenever any such suit comes before the Court on appeal". If we remember this, there is really no necessity for altering the word "suit" to "appeal" in S. 10 (2) when we apply it to cases where the court-fee has not been paid by a plaintiff-respondent.

The appeal is accordingly dismissed with costs.

K.S. *Appeal dismissed.*

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1. (1919) 56 I.C. 316.
2. (1912) 15 I.C. 463 (F.B.).
3. (1881) I.L.R. 7 Cal. 348.
4. (1920) 60 I.C. 654.
5 (1916) 32 M.L.J. 85: 40 I.C. 50.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE PANDRANG ROW, MR. JUSTICE ABDUR RAHMAN, MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE PATANJALI SASTRI.

B. Nana Rao .. *Appellant** (*4th Defendant*)

v.

M. U. Arunachalam Chettiar and others .. *Respondents* (*2nd Plaintiff—1st Plaintiff's L.Rs.—Defendants 1 to 3*).

F.B.

Nana Rao *v.* Arunachalam Chettiar.

Civil Procedure Code (V of 1908), S. 64, Explanation—Attachment in one suit—Private transfer made during pendency of attachment—Subsequent attachment in execution of another decree—Purchase in auction sale—Validity of title of private transferee.

Held, by the majority of the Full Bench (Abdur Rahman and Krishnaswami Aiyangar, JJ., dissenting): S. 64, Civil Procedure Code, provides that where a property has been attached any subsequent alienation is void against all claims enforceable under the particular attachment, but it does not go beyond this. An attachment effected after a private alienation is not assisted by an attachment before the alienation. If the execution proceedings in which the second attachment has been made, have been instituted before assets have been brought into Court, the creditor will be entitled to rateable distribution if the property is sold in the earlier execution proceeding; but if the sale takes place as the result of the attachment effected after the private alienation a person who buys the property at the Court auction will not obtain a good title.

Per *Abdur Rahman and Krishnaswami Aiyangar, JJ.*—A private transfer made after and during the pendency of an attachment in one suit, would be void against the title of an auction-purchaser in execution of a decree in another suit under an attachment made after the transfer but while the decree in the former suit remained unsatisfied and the attachment therein was subsisting.

Appeal against the decree of the Court of the Subordinate Judge of Salem in A. S. No. 82 of 1934 preferred against the decree of the Court of the District Munsif of Krishnagiri in O. S. No. 388 of 1931.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellant.

T. L. Venkatarama Aiyar for Respondents.

The second appeal came up in the first instance before their Lordships *Krishnaswami Aiyangar* and *Somayya, JJ.*, who made the following

ORDER OF REFERENCE TO A FULL BENCH†.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—The decision of this second appeal turns on the effect of the explanation added to S. 64 in the

* A. No. 742 of 1935. 11th October and 24th November, 1939.

†2nd May, 1939.

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Code of Civil Procedure, 1908, which according to the appellant, has brought about a change in the rights of claimants to rateable distribution, as they were understood to be when the old Code of 1882 was in force. As a comparison of the language of the present S. 64 with that of S. 276 of the Code of 1882 is necessary for the decision of the question, it will be advantageous to set out the provisions of both the sections for the purpose of studying them together. S. 276 in the form in which it existed in the Code of 1882, had been enacted by the Code of 1877, with a change of language as compared with its predecessor (S. 240 of the Code of 1859), made not with the object of changing the law but for better expressing the meaning underlying the section as interpreted by the Privy Council in *Anund Loll Doss* v. *Jullodhur Shaw*[1].

S. 276 of the Code of 1882 is as follows:—

"When an attachment has been made (by actual seizure or by written order duly intimated and made known in manner aforesaid), any private alienation of the property attached (whether by sale, gift, mortgage or otherwise, and any payment of the debt, or dividend, or a delivery of the share) to the judgment-debtor (during the continuance of the attachment), shall be void as against all claims enforceable under the attachment."

S. 64 of the present Code is as follows:—

"Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation:—For the purpose of this section, claims enforceable under an attachment include claims for the rateable distribution of assets."

The suit out of which the second appeal has arisen was instituted to enforce a mortgage executed on 20th May, 1926. The plaintiffs who or whose interests are now represented by respondents 1 to 4, were the undivided brothers of Thandavaraya Chetty the mortgagee who had died before suit. There were four defendants impleaded in the suit of whom the first three were the mortgagor and his undivided brothers, respondents 5 to 7 in the second appeal. They did not contest the suit and have in fact remained throughout *ex parte*, neither opposing nor supporting the claim of the mortgagee. The opposition really came from the appellant who was the fourth defendant in the suit. He derived his interest in the suit property under a Court sale held in execution of a money decree obtained by a creditor of the mortgagor in O. S. No. 237 of 1925 on the file of the District Munsif of Krishnagiri. The Court sale was on 16th December, 1926, more than six months after the mortgage. He raised several defences to the suit but they

1. (1872) 14 M.I.A. 543 at 549.

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were all overruled by the Courts below, on substantially the same grounds, and a decree has been passed in favour of the mortgagees. Of the defences raised, one alone merits consideration as the others have all been satisfactorily disposed of, by concurrent findings of the Courts below. That defence was that at the date of the mortgage there was a pending attachment on the property, and that as he the appellant had purchased the property at a sale held in the process of enforcing what according to him should be regarded as a claim *enforceable under the attachment* within S. 64, his title prevailed over that of the mortgagee. In fact he claims that his purchase was the resultant of a claim enforceable under the pending attachment as defined by the explanation to S. 64 of the Code of Civil Procedure. Not that the attachment itself resulted or could result in the sale at which he purchased, so that it could be aptly described as a claim enforceable under that attachment, but that the same efficacy is to be attributed by force of the statute to the later attachment under which he purchased. This is the question that arises for consideration and for appreciating it a few facts are necessary.

The attachment on which the appellant relies in support of his attack on the mortgage had been made as already indicated under a different decree from that in execution of which he purchased the property. His purchase was as already mentioned on 16th December, 1926, in O.S. No. 237 of 1925 in pursuance of an attachment effected in it on 29th June, 1926, that is more than a month after the suit mortgage. If regard be had to this attachment alone, it is clear that it cannot avail him to get rid of the suit mortgage which was earlier than the attachment, as S. 64 taken by itself and without the explanation renders a private transfer void only if it is made subsequent to *the* attachment. What is however urged for the appellant is that there was an earlier attachment though in another suit against the same judgment-debtor and that he could take advantage of that attachment for avoiding the suit mortgage. That other suit was O.S. No. 497 of 1923 on the file of the Principal District Munsif of Salem, in which a money decree had been obtained by one Appu Chetty in October, 1924. In it an attachment was effected on 14th April, 1925. This attachment which was more than a month prior to the suit mortgage was pending during all the time the decree in O. S. No. 237 of 1925 was under execution and was in fact subsisting even at the time when the appellant purchased the property. It appears that on the very day of the appellant's purchase at the Court sale, Appu Chetty the decree-holder in the other suit, applied for and obtained an order for rateable distribution of the assets realised by that sale. The decree in O. S. No. 497 of 1923 was

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not however fully satisfied, and for aught we know the attachment made in it continued and was still alive even at the date of the present suit though it does not appear to have been pursued to a sale.

For attracting the operation of the section, the first condition prescribed by it, is, that the transfer sought to be challenged must have been made after and pending an attachment. But this circumstance is not by itself sufficient. It must also appear that the transfer was contrary to the attachment in the sense that it must have the effect of prejudicially affecting rights brought into existence by the attachment, or likely to arise out of it. If both these conditions are satisfied the transfer will be disregarded not wholly even then, but to the extent necessary to protect those rights. These are the rights which are comprehended by the expression 'claims' enforceable under the attachment in S. 64. Every transfer contrary to such a claim is contrary to the attachment itself according to the plain intendment of the section. Normally and in the absence of the explanation, the protection afforded by the section on an attachment being made will benefit the decree-holder directly and the auction-purchaser indirectly. They would be the only persons who could under the section acquire rights if the attachment is duly enforced according to the procedure prescribed by the Code. Even then those rights depend on the particular attachment which preceded the private transfer, and which alone can be used as a weapon of attack against it. As the Privy Council has ruled in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[1]:

> "All that can be done is to employ that attachment for the purpose of impugning the private alienation, for, it is on that alone that the decree-holder's title" (in this case the decree-holder was the Court auction-purchaser) "to the property........rests."

The question whether a third class of persons, namely, other decree-holders who had not attached but who had merely applied for the execution of their decrees within the time limited by S. 295 of the Code of 1882, were entitled to the protection of S. 276 corresponding to the present S. 64, was considered, but except in *Kunhi Moosa* v. *Makki*[2], *Durga Churn Rai Chowdhury* v. *Monmohini Dasi*[3], *Ganga Din* v. *Khushali*,[4] and *Manohar Das* v. *Ram Autar Pande*[5]. In Bombay, the decision was adverse to their pretensions. The reason for the decision was given in the following

1. (1916) 32 M.L.J 425: L R. 44 I A. 72: I.L.R. 44 Cal. 662 (P.C.).
2. (1899) 10 M.L.J. 98: I.L.R 23 Mad. 478.
3. (1888) I.L.R. 15 Cal. 771.
4. (1885) I.L.R. 7 All. 702.
5. (1903) I.L.R. 25 All. 431.

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words by the Allahabad High Court in the latest of the cases cited:

"The words "shall be void as against all claims enforceable under the attachment" in S. 276 of the Code of Civil Procedure cannot in our judgment include the claims of a person who has not caused the property of the judgment-debtor to be attached, but has simply asked for a rateable distribution of the assets which might be realised by the sale of the property of the judgment-debtor. Those words have been in our judgment rightly interpreted to mean the claim of the person who has obtained an attachment. They were evidently added to the section in order to remove the ambiguity which existed in the corresponding section of Act VIII of 1859. The claim of a person who applied for a rateable distribution of the assets, is, in our opinion, not a claim which is enforceable, under the attachment placed upon the property at the instance of another judgment-creditor. It is manifest that if the claim of the attaching creditor be discharged, and his decree be recorded as satisfied, the attachment obtained by him must necessarily come to an end. In that case there would be no sale in pursuance of the attachment, and no assets would be realised which might be rateably distributed. Therefore the claim of a person who has applied for a rateable share in assets which might or might not be realised cannot be regarded as a claim enforceable under the attachment."

It will be observed that S. 295 contained no reference to an attachment, at any rate in express terms, but proceeded to give effect to claims for rateable distribution, whenever assets were realized by sale or otherwise in execution of a decree. Assets may be realised legally without an attachment, *e.g.*, in respect of the balance of the sale proceeds under a mortgage decree after satisfying the mortgagee; or even in other cases, by a sale without an attachment, which at the worse is only irregular and not wholly void. *Subramania Iyer* v. *Krishna Iyer*.[1] It can scarcely be contended that such assets were excluded from the operation of the section. There seems to be little ground therefore for connecting S. 295 with an attachment so as to make its operation dependent on it. An attachment however is the all important consideration for the application of S. 276. It is out of it, that the rights recognized by the section spring up. On this point, the observations of Mitter, J., in *Anandalal Das* v. *Radhamohan Shaw*,[2] throw useful light. Referring to S. 271 of the Code of 1859 by which rateable distribution was limited to the surplus alone remaining after satisfaction of the attaching decree-holder's claim, the learned Judge observed:—

"That section, it is to be observed. comes into operation when the property attached has already been sold, and when there is a surplus left in the hands of the Court after the demand of the attaching creditor is satisfied in full The persons among whom this surplus is directed to be distributed are allowed to participate in it, not because of the previous attachment with which they had nothing to do, but because of a particular contingency which has brought into the hands of the Court a certain sum of money which the

1 (1925) 51 M.L.J. 172.

2. (1868) 2 Beng.L.R. 49 (F.B).

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Court has been authorized to apply for their benefit. The efficacy of the attachment is exhausted for the benefit of the attaching creditor himself and if no surplus is left after full satisfaction of his decree, the other creditors must be left to execute their decrees as best as they can."

It follows that it is unnecessary for the application of S. 295 to show that the assets realized were realized as the result of an attachment. In fact the section did not concern itself with an attachment or its absence but merely started with enquiring whether the assets had been realised by sale or otherwise in execution. The rights conferred by the section were not made dependent on an attachment, and were not we think in fact dependent on such a circumstance. When the section itself does not suggest the hypothesis of a prior attachment it is difficult to support the theory that the right given by it, is or can be regarded as a right or claim enforceable under an attachment. Such a right could ordinarily inhere only in the creditor who attached, and who alone could be said to have rights enforceable under the attachment, though after the sale takes place the benefit and the protection of S. 276 would accrue to the purchaser also. For the protection of the purchaser is the protection of the attaching creditor, as it is only through the sale, that the creditor gets his decree satisfied. There was therefore little justification for the view that a claim for rateable distribution could be regarded as a claim enforceable under an attachment within the meaning of S. 276 of the old Code. It would have been perfectly legitimate to put the same construction on S. 64 of the Code of 1908 but for the explanation newly added to the section.

It is contended for the appellant that an important change has been introduced in the Code of 1908 by the addition of the explanation in S. 64. Before dealing with this contention it may be observed in passing that in other respects the section is practically a repetition of the old S. 276. We doubt whether the substitution of the words 'contrary to such attachment' for the words 'during the continuance of the attachment' which occurred in the old Code has the effect of making S. 64 'less favourable' or more restrictive as Wallis, C.J., was inclined to think in *Annamalai Chettiar* v. *Palamalai Pillai*[1]. In the light of the decisions of the Privy Council in *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi*[2] and *Amund Loll Doss* v. *Jullodhar Shaw*[3], it could not have been the object of S. 276 to render all alienations during the continuance of the attachment void, irrespective of their effect on the rights of the attaching creditor. It avoided such of them only; as tended to prejudice rights arising and enforceable under the attachment. It

1. (1917) 33 M.L.J. 707: I.L.R. 41 Mad. 265 (F.B.).
2. (1901) 12 M.L.J. 73: L.R. 29 I.A. 9: I.L.R. 29 Cal. 154 (P.C.)
3. 14 M.I.A. 543.

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is we think more reasonable therefore to hold that the change of language was merely verbal and intended to make the sense clearer, rather than to abridge previously existing rights.

Now coming to the explanation newly added by the Code of 1908 the question is whether it has gone far enough to bring within the protection given by the section, persons who at the date of the private transfer had not attached but had only applied for the execution of their decrees, that is, applied for rateable distribution under S. 73. In other words, can such non-attaching decree-holders take advantage of an earlier attachment made at the instance of another decree-holder, and on its strength, seek to avoid the transfer for their benefit also in spite of the fact that they had not attached the property at all or attached it only after the transfer? Or is it further necessary for these non-attaching decree-holders to entitle themselves to the benefit of S. 64 that assets should also have been or be realised under the earlier original attachment? The appellant contends that the further condition implied in the latter query is not required by the section when read with the explanation. This is really the point in controversy. That there are observations in the judgments of both of Wallis, C.J. and Kumaraswami Sastri, J., in the Full Bench decision in *Annamalai Chettiar* v. *Palamalai Pillai*[1], contrary to the appellant's contention can scarcely admit of doubt. Wallis, C.J. has observed:

> " S 64 of the present Code affords no greater protection to the attaching decree-holder than S. 276 of the old Code, and if he cannot protect himself against an alienation after attachment unless the *attached property is brought to sale* in execution of the decree in respect of which the attachment was made, it necessarily follows that other decree-holders who have applied for execution cannot be in any better position."

Kumaraswami Sastri, J. is more express. He said:—

> "There can be little doubt that S. 64, as it stands at present, can protect decree-holders entitled to rateable distribution against private alienation *only where assets have been realised*, in which case they will be entitled to share the proceeds in preference to the alienee."

The Italics are ours. These observations which do militate against the appellant's contention are sought to be got over in two ways. In the first place it is argued that they must be regarded as unnecessary for the decision of the question, referred to the Full Bench, and were in fact outside the reference. Looking at the terms of the reference there is justification for this argument as the question referred to merely proceeded on an assumption of facts entirely absent in the present case.

The question was this:—

1. (1917) 33 M.L.J. 707: I.L.R. 41 Mad. 265 (F.B.).

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"Whether non-attaching decree-holders who have applied for rateable distribution under a subsisting attachment which has since been raised by the satisfaction of the decree or otherwise, are entitled to question a private alienation made during the continuance of *such attachment*?"

It is quite clear that the reference was made on the footing that the prior attachment had ceased to be operative, by the decree having been satisfied or otherwise, unlike in the present case where the prior attachment has been found subsisting at all material times, and not shown to have been ever withdrawn or terminated. But for this difference in the facts, we should be bound to give effect to what we think was an opinion adverse to the appellant expressed by the Full Bench. It is conceded on both sides, that there is no reported decision of this Court at any rate, which has dealt with the point in an authoritative manner, so as to furnish a precedent binding on us.

Secondly it is urged that the qualification suggested by the learned Judges is inconsistent with the language of the explanation and opposed to the policy underlying the section itself. It is to be observed that the crucial date with reference to which the validity of a private transfer has to be tested under S. 64, is the date of the transfer itself. If before that date rights had actually come into existence, or should, by force of the statute, be deemed to have come into existence, they must be allowed to prevail against the mortgagee whose rights arise under and only on the date of, the mortgage *Prima facie*, such an overriding right can spring into existence only in favour of a decree-holder who has attached the property prior to the transfer. Even then, the attachment does not by itself and without more operate to put an end to the transfer, even as against himself. The rights flowing from an attachment are inchoate and imperfect, and requiring to be perfected by further process in execution to be pursued till the attached property is sold. In order to remove the impediment it is essential that the creditor should follow out the remedial procedure prescribed by the Code to its end. This was the mode, and we think the only mode available to the attaching decree-holder under the old Code, to get rid of a private alienation. None-the-less, the right, as an efficient, enforceable right came into existence simultaneously with the attachment, and would last as long as the attachment itself lasted. It might be that further action was necessary to achieve the overthrow of the private transfer, but the potentiality was there. The weapon had been forged and ready for use; it had only to be wielded. By whom could it be wielded? By the attaching decree-holder and the auction-purchaser alone under the old Code, and even under the present S. 64 without the explanation. But does not the explanation bring in a new class of

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persons, who, at the date of the private transfer, had only put in claims for the rateable distribution of assets and had not attached the property? As we have already observed this class of persons were held not entitled to the benefit of the protection under the old Code. But it is impossible to deny that it was the plain object of the explanation to admit them to the protection of the section, whether or not the words employed sufficed to achieve that object. So much we think is clear. It is only necessary to enquire what the nature of the claim is to be and subject to what limitations if any it is allowed to be recognised.

By *claim* is meant a demand, a right or title to something. A claim for rateable distribution of assets is accordingly a demand cognizable under S. 73 of the Code. S. 73 without its provisoes which are immaterial for the present purpose runs as follows:—

"Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons."

It will be observed that in one important respect there is a change of language from the old S. 295. For the words 'whenever assets are realised by sale or otherwise in execution of a decree' which found place in it, the words 'where assets are held by a Court' have been substituted. For the words 'prior to the *realisation*' have been substituted 'before the *receipt* of such assets'. These changes make it clear that it is wholly unnecessary under the present Code that the assets should have been brought into Court as the result of an attachment or by realisation in execution. The method by which the assets reaches the hands of the Court is now made perfectly immaterial; all that is necessary is that the assets should be *held* by the Court irrespective of the means or the process which produced it. (Vide *Pratapa Bhattadu* v. *A. E. L. Mission*[1] and *Thiraviyam Pillai* v. *Lakshmana Pillai*[2].) Realisation in execution might perhaps suggest, though not necessarily a prior attachment. Even this possibility of a connection to an attachment is now ruled out by the substituted words of the present section. Neither the form in which execution has been had, nor the precise extent to which execution had been allowed to run nor the exact source or genesis of the fund in Court any longer forms part of the definition of assets, *Noor Mahomed Dawood* v. *Bilasiram Thakursidass*[3]. A claim for rateable distribution under the section

1. (1924) I.L.R. 49 Mad. 38.
2. (1917) 35 M.L.J. 150: I.L.R. 41 Mad. 616
3. (1919) I.L.R. 47 Cal. 515.

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now stands entirely dissociated from any attachment and its efficacy as a claim is made to depend only upon its being made prior to the receipt of the assets by the Court. We are of opinion that immediately on the application being made, provided it is made in time, the applicant acquires a right to rateable distribution which is denied to all later applicants. The satisfaction of that right may have to await the receipt of the assets, but that is no reason for saying that there is no right or claim in existence until then. We are not able to persuade ourselves that the Privy Council decision in *Mina Kumari's case*[1] has laid down the contrary proposition. In that case, their Lordships were interpreting S. 295 of the old Code for the purpose of S. 276. A claim under S. 295 had necessarily to function through an attachment in order to operate against a private transfer under S. 276. In fact, as we have said, the attachment by itself did not and could not displace the transfer, which could only be displaced by the attachment being worked out, and only by the results of such working out. The observations of the Privy Council must be understood with reference to the question before them, namely, whether S. 276 put an end to the disputed transfer. The answer was no, as a claim for rateable distribution had perforce to operate through an attachment which was an indispensable condition under the section. But it does not follow from this observation that no claim arose under the section until assets were received or came to be held by the Court. On the contrary we are inclined to think that the moment an application is made by persons of the description mentioned in the section, and within the time limited by it, a claim straightaway did arise which can be properly described as a claim for the rateable distribution of assets, within the meaning of the explanation to S. 64.

If the explanation is incorporated into the section itself, it would read as follows:—

> "Where an attachment has been made, any private transfer (of the property so attached) contrary to such attachment shall be void as against all *claims for rateable* distribution of assets."

It is not, be it noted, as against claims for rateable distribution of assets *under the attachment*, that the transfer is rendered void but as against claims for rateable distribution of assets simpliciter without reference so far as such claims are concerned to the attachment. By the explanation claims for the rateable distribution of assets—note that the words 'under an attachment' are not added so as to qualify such claims—are equated to claims enforceable under an attachment. True, an attachment must first

1. (1916) 32 M.L.J. 425: L R. 44 I.A. 72: I L.R. 44 Cal. 662 (P.C.),

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be made and must also subsist at the time of the private transfer. But if a claim for rateable distribution has arisen while yet the attachment is pending, it is given the efficacy which is the peculiar attribute of a claim enforceable under the attachment, in the sense explained. It is, of course, necessary that the transfer should also be contrary to the claim for rateable distribution. So it will be, as the explanation makes it clear that it is to have and be given, without reference to an attachment, the same vitality as a claim based on the attachment. A claimant for rateable distribution is thus admitted to the protection which was till the introduction of the explanation being shared by the prior attaching decree-holder, and a purchaser under that attachment. It is unnecessary under the present Code in view of the extended meaning given by the explanation to 'claims enforceable under an attachment' to consider whether a claim for rateable distribution can strictly be regarded as a claim truly enforceable *under the attachment*. The statute has said so and there is an end of the matter. It is not for the Court to ignore a statutory definition and proceed to try and extract the true meaning of an expression independently of it.

We have said that the Bombay High Court took a view different from that adopted by the other High Courts on the meaning of S. 276 of the old Code. In the opinion of Telang, J., ex pressed in the decision in *Sorabji Edulji Warden* v. *Govind Ramji*[1], as a result of the combined operation of that section and S. 296 of the old Code, a claim for rateable distribution could be held to be a claim enforceable under an attachment. That view was if we may say so with respect, based on a forced construction, and did not we think recommend itself to the Privy Council in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[2], where their Lordships merely assumed its correctness 'for the sake of argument' but yet found it unserviceable. Telang, J.'s observation based on *Mahadeo Dubey* v. *Bhola Nath Dichit*[3] that:

> "One cannot logically avoid the conclusion that the claim of the creditor who has applied for execution as mentioned in S. 295 is properly described as one 'enforceable under the attachment' of the creditor who may be called the principal creditor",

cannot, it seems to us, be supported in the light of later authority. However they may be, it is undeniable that the result achieved had the merit of advancing the beneficent objects underlying the section. As observed by Strachey, C. J., in

1. (1891) I.L.R. 16 Bom. 91.
2. (1916) 32 M.L.J. 425: L.R. 44 I.A. 72: I.L.R. 44 Cal. 662 (P.C.).
3. (1882) I.L.R. 5 All. 86.

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Bittal Das v. *Nand Kishore*,[1] those objects were two-fold:

"The first object is to prevent unnecessary multiplicity of execution proceedings, to obviate in a case where there are many decree-holders each competent to execute his decree by attachment and sale of a particular property, the necessity of each and every one separately attaching and separately selling that property. The other object is to secure an equitable administration of the property by placing all the decree-holders........ upon the same footing and making the property rateably divisible among them, instead of allowing one to exclude all the others merely because he happened to be the first."

These being the salutary objects behind the section, it scarcely admits of doubt that the extension given to S. 276 tended to advance the policy of the law. Telang, J.'s opinion not having been shared by the other High Courts, it became necessary, and this was the chief reason, to amend the section by adding the explanation to S. 64. But it does not by any means follow that the Legislature intended to go no further than the decision. This is a question to be answered only on a true construction of the language of the section to be understood no doubt in the light afforded by a historical retrospect of the antecedent case-law but not to be controlled by it.

We have already adverted to the language of S. 64, and to the effect on it of the explanation. It is necessary for a proper appreciation of the point under consideration to emphasise an aspect of the matter, which has not received the importance it deserves. For the purpose of attracting the operation of S. 276, a claim for rateable distribution had to be a claim enforceable under the attachment. Its connection as we have observed to a live subsisting attachment was a necessary condition of the protection. So it was we think that Telang, J., had to lay emphasis on the fact that the first attachment in the case before him was in force at the date of the application. In fact he regarded this circumstance as the essential feature which distinguished the case before him from those reported in *Ganga Din* v. *Khushali*[2] and *Durga Churn Rai Chowdhry* v. *Monmohini Dasi*[3], as the following observation shows:

"But it is to be remarked that in both the cases referred to, the first attachment was either in fact withdrawn or had become inoperative by law, and that circumstance necessarily distinguishes both these cases from the one before me, in which the first attachment stands, and is admittedly to be fully operative."

It is difficult, we agree, to interpret S.276, in a different sense, as the private alienation was declared by the section to be void only

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1. (1900) I.L.R. 23 All. 106.
2. (1885) I.L.R. 7 All. 702.
3. (1888) I.L.R. 15 Cal. 771.

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against 'all claims enforceable *under the attachment'*. The words italicised enacted a paramount check and only subject to it, the old clause could function. Where the link between the attachment and the claim did not exist, the protection also did not extend. This in fact was also the basic ground of the decision of the Privy Council in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[1]. In that case, the respondent who was the decree-holder and had purchased under a later attachment was held not entitled to impugn an earlier private alienation, though it was made at a time when there was an attachment pending in a prior decree which had not been pursued to a sale. The effect of their Lordships' judgment as correctly stated in the head note was this:—

"The respondents' title rested entirely on the attachment in the execution case No. 16 of 1907 (the later attachment in pursuance of which he had purchased) and that alone was the attachment the continuance of which could avoid the appellants' private alienation, but on the facts it did not do so The respondents could not invoke the attachment in execution case No. 8 of 1902 (the first attachment) to defeat the alienation to the appellant which was made in different execution proceedings. Nor could he with its aid rely on S. 295 of the Code of Civil Procedure, 1882, as entitling him to the benefit of S. 276."

We strongly feel that there is no warrant for holding that the same condition is to be imported into the interpretation of the new section. Look at the result. In spite of the apparent purpose of the explanation which was to throw open the protection of the section to a claimant for rateable distribution it has finally ended, on this interpretation, by failing to give it to him or gives it when he cannot want it. For to say that he qualifies himself for the protection only on assets being realised is to nullify the effect of the explanation. When does he want the protection? Not when the assets have been realized. For then he is in a position to obtain immediate satisfaction and his right cannot thereafter be taken away from him. It is with all respect meaningless to argue that he requires any protection when this stage is reached, as by then the private transfer had been struck at and destroyed by the sale which has fetched the assets. The protection if it is to be real is needed at an earlier stage and only to remove an impediment placed in the way of the execution, proceeding along normally and fructifying ultimately into a sale, in the proceeds of which, when once realised, his rights become crystalized and thereafter indisputable. It seems to us therefore that there is every reason why the Court should struggle against a construction which rendered the legislative effort entirely otiose. It was pointed out by the

1. (1916) 32 M.L.J. 425: L.R. 44 I.A. 72: I.L.R. 44 Cal. 662 (P. C.).

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Calcutta High Court as early as 1888, *Durga Churn Rai Chowdhury* v. *Monmohini Dasi*[1] that:

"To hold that claims under S. 295 are claims enforceable by attachment against which assignments made under S. 276 are void, would perhaps be carrying out the intention that may have been in the mind of the Legislature when the old Code (of 1859) 'which did not provide for a rateable distribution was suddenly modified by the introduction of that perfectly new principle. Unfortunately the section of the Code relating to execution were not re-cast so as to be fully adapted to the new state of things, and it appears to us that in this respect S. 276 has not been successfully framed with the object of protecting rateable distribution amongst claimants under S. 295."

Where the Calcutta High Court had failed, Telang, J., succeeded by a construction which has certainly the merit, if we may say so with respect, of originality and boldness, but all the same emphasised the need for an amelioration in favour of the claimant. In the full Bench decision in *Annamalai Chettiar* v. *Palamalai Pillai*[2] itself one of the referring Judges Seshagiri Aiyar, J.,expressed a strong inclination in favour of the wider construction, but was only held back by the pressure of authority which he thought was against it. Bakewell, J., was apparently of the opinion that the cases decided under the old Code ceased to be authoritative in the changed conditions brought about by the addition of the explanation. We are also inclined to accept the same view. For in approaching the construction of the new section, it is not without value to remember that the new Code as its preamble shows, is both a consolidating and an amending Act. If the words of a later statute differ materially from those of an earlier one, effect should be given to the change, especially where to do so would be to advance the policy underlying it. We agree that if the language fails to achieve the object in view, it can only be regretted but not helped. But the Court need not be astute to adopt a construction which would tend to bring about a frustration of the objective. If the words of a later statute differ from those of an earlier one, the Court in construing the later, is not bound by decisions under the earlier, even though it relates to the same subject-matter, Ex parte *Willey*: In re *Wright*[3], though change of language may not by itself be conclusive on the question whether a change of interpretation was intended. We should in this connection remember the principles of construction laid down by the House of Lords in *Bank of England* v. *Vagliano Brothers*[4], and followed by the Privy Council in *Narendra Nath Sircar* v. *Kamalbasini Dasi*[5]:

"The proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any con-

1. (1888) I.L.R. 15 Cal. 771.
2. (1917) 33 M.L.J. 707: I.L.R. 41 Mad. 265 (F.B.).
3. (1883) 23 Ch. D. 118 at 127.
4. (1891) A.C 107.
5. (1896) 6 M.L.J. 71: L R. 23 I.A. 18: I.L.R. 23 Cal. 563 (P.C.).

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siderations derived from the previous state of the law and not to start with enquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute intended to embody in a Code a particular branch of the law, is to be treated in this fashion................its utility will be almost entirely destroyed. The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used instead of, as before roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions."

We are conscious that Kumaraswami Sastri, J., was for limiting the scope of the section to very narrow limits, and expressed the view that

"In the numerous and important class of cases relating to attachment of immovable property the amendment would be of no use to decree-holders entitled to rateable distribution. Assuming that the Legislature intended the attachment under S. 64 to enure for the benefit of all persons entitled to rateable distribution who had applied for execution prior to the private alienation it has not gone far enough when it introduced the explanation to S. 64 worded as it is, and made no provision for the continuation of the attachment in O 21 in cases where the attaching creditor was paid off The result is not very happy, but the remedy is in the hands of the legislature."

The idea contained in the last sentence in the passage cited has been shared by Fazl Ali, J., in *Radha Mohan* v. *Mst. Wahidan*[1]. But we venture to think with the utmost respect, that the result has been achieved in fact. Kumaraswami Sastri,J., has relied mainly on the Privy Council decision in *Mina Kumari's case*[2] in support of the observations he has made. We do not think, as we have indicated already, that the decision was intended to cover cases arising under the present Code, at any rate on facts different from those which were present in the Full Bench case. He has also referred to O. 21, rr. 55, 57, 89 and certain forms appended to the Code of Civil Procedure. These rules and forms were, we think, intended to provide for ordinary cases, where the complications arising out of claims for rateable distribution do not come into play, and ought not to be used to cut down the effect of the explanation to S. 64. He notices the provision contained in O. 21, r. 90, which does seem to affirm a present right in the claimant for rateable distribution without reference to the necessity for the realization of assets, but it is not clear why the pointing finger of this rule, as well as r. 72 (2) should not be followed to reach the clue to the proper construction. The reasoning to be found in the decisions reported in *Pratapa Bhattadu* v. *A.E.L. Mission*[3], *Bibi Miyakhan* v. *Gulab-*

1. (1934) I.L.R. 13 Pat. 446.
2. (1916) 32 M.L.J. 425 : L.R. 44 I.A. 72 : I.L.R. 44 Cal. 662 (P.C.).
3. (1924) I.L.R. 49 Mad. 38.

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chand[1] and *Lakshmi* v. *Kuttunni*[2] seem to go some distance in favour of the appellant. Where as *Gotatai Vigneswarudu* v. *Venkata Suryanarayanamurthi*[3] a decision of Wallis, C.J., and Kumaraswami Sastri, J , tends the other way. There are also other decisions of other High Courts to an opposite effect but in all of them, the first attachment had come to an end, as in the decisions of our own Court.

We find it difficult to understand why a subsequent lapsing of the original attachment, whether by satisfaction of the decree or otherwise should prejudice the right of the claimant for rateable distribution provided he had made the claim in time, that is, while that attachment was in force. If we are justified in thinking that the right comes into positive existence taking a definite shape the moment a proper application under S. 73 is made it stands to reason that it should not suffer annihilation by the act of a mere stranger. The right being in existence it may be necessary to enforce it by proceeding to reattach and sell the property in the execution already taken out in order that the private alienation may be got out of the way. In such a contingency the fact that the attachment so made is subsequent to the transfer should not matter, as otherwise the scope of the explanation and the object behind it would stand unwarrantably restricted. Nor can we see why the claimant for rateable distribution should be denied the initiative in his own interest to work out his statutory right, instead of fastening his hopes to the off-chance of the decree-holder who first attached proceeding with his execution and producing a result in which he could share. We are not unware that the view expressed by us goes against some of the observations in the Full Bench decision but in all humility we feel that the point merits reconsideration.

We therefore think it eminently desirable that the question discussed above should be considered and decided by a Full Bench. We accordingly frame the question as follows:—

"Is a private transfer made after and during the pendency of an attachment in one suit, void against the title of an auction-purchaser in execution of a decree in another suit under an attachment made after the transfer but while the decree in the former suit remained unsatisfied and the attachment therein was subsisting.?"

The appeal came for hearing in pursuance of the aforesaid Order of Reference, before the Full Bench as constituted above.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellant.

T. L. Venkatarama Aiyar for Respondents.

1. (1911) 13 Bom L.R. 1189.
2. (1886) I.L.R. 10 Mad. 57.
3. (1917) 7 L.W. 573.

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The Full Bench expressed the following:—

OPINION.*

The Chief Justice.—The question which has been referred for decision is this:

"In a private transfer made after and during the pendency of an attachment in one suit, void against the title of an auction-purchaser in execution of a decree in another suit under an attachment made after the transfer but while the decree in the former suit remained unsatisfied and the attachment therein was subsisting?"

The circumstances which have given rise to this reference are these. On the 25th October, 1924, one Appu Chetty obtained a money decree in O. S. No. 497 of 1923 of the Court of the District Munsif of Salem. The decree was transferred to the Court of the District Munsif of Krishnagiri for execution. On the 5th March, 1925, the decree-holder applied in Execution Proceedings No. 132 of 1925 for the attachment and sale of the property. There was then due under the decree a sum of Rs. 2,399-4-6. An order of attachment was passed on the same day and the attachment was effected two days later, the 7th March, 1925. On 20th May, 1926, the judgment-debtors mortgaged the attached property to respondents 1 to 4 to secure a loan of Rs. 1,200. Appu Chetty had previously agreed with his judgment-debtors to accept payment of the amount due under his decree by instalments. On the 22nd August, 1925, Appu Chetty's petition for execution was dismissed in accordance with the agreement arrived at, but the attachment was continued pending the payment of the remaining instalments. On the 15th August, 1925, one Pedda Sambayya Chetty obtained a money decree against the same judgment-debtors in the Court of the District Munsif of Krishnagiri, and on the 15th April, 1926, Pedda Sambayya Chetty applied for the attachment of the same property in Execution Proceedings No. 322 of 1926 of that Court. Pedda Sambayya Chetty's application for attachment was granted on the 10th June, 1926 and the attachment was effected on the 29th of that month. On the 12th December, 1926, Appu Chetty, to whom there was still owing under his decree a sum of Rs. 568-4-0 applied in the execution proceedings of Pedda Sambayya Chetty for rateable distribution and his

* 11th October, 1939.

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application was granted on the 16th December, 1926, the date on which the property was sold under Pedda Sambayya Chetty's attachment. Out of the sale proceeds Appu Chetty received a sum of Rs. 105-14-9, being the amount payable to him on the rateable basis. The purchaser at the auction held in Pedda Sambayya Chetty's execution proceedings is the appellant in the appeal in which this reference has been made. On the 11th November, 1931, the mortgagee respondents filed a suit on their mortgage in the Court of the District Munsif of Krishnagiri. The suit was defended by the appellant and the question was whether the mortgagees or he had the better title. The appellant claimed that he had the better title by reason of the provisions of S. 64 and S. 73 of the Code of Civil Procedure. The District Munsif relying on the decision in *Annamalai Chettiar* v. *Palamalai Pillai*[1] granted the respondents a mortgage decree and his decision was upheld by the Subordinate Judge of Salem. The correctness of these decisions was challenged in a second appeal, which came before Krishnaswami Aiyangar and Somayya, JJ., who after hearing the arguments made this reference.

From the narration of the facts it will be observed that the property was sold in Pedda Sambayya Chetty's execution proceedings, which were instituted after the mortgage had been created. The appellant says that the mortgage was invalid by reason of the provisions of S. 64 of the Code. The reasoning is this. The mortgage was created during the attachment obtained by Appu Chetty and S. 64 renders the mortgage void notwithstanding that this sale took place in Pedda Sambayya Chetty's execution proceedings. The answer to the question therefore depends on the effect to be given to the wording of S. 64, and this involves the consideration, not only the decision in *Annamalai Chettiar* v. *Palamalai Pillai*[1], but of numerous other authorities.

Before proceeding to discuss the authorities which have bearing on the question before us I will set out the relevant statutory provisions. S. 64 reads as follows:—

"Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such

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1. (1917) 33 M.L.J. 707: I.L.R 41 Mad. 265 (F.B.).

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attachment, shall be void as against all claims enforceable under the attachment.

Explanation.—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets."

This section is the corresponding section to S. 276 of the Code of 1882 which said:—

"When an attachment has been made by actual seizure or by written order duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise, and any payment of the debt, or dividend, or a delivery of the share, to the judgment-debtor during the continuance of the attachment, shall be void as against all claims enforceable under the attachment."

The wording is somewhat different, but so far as this case is concerned there is no material change, unless it is effected by the explanation to the section in the present Code. Both S. 276 of the Code of 1882 and S. 64 of the present Code rendered a private alienation void as against claims enforceable under the attachment.

The section which provides for a rateable distribution is S. 73, eliminating the provisoes which have no bearing here S. 73 says:—

"Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons."

Therefore in order to entitle a creditor to rateable distribution all that is necessary is that he shall have made, before the Court executing the decree has received the assets of the judgment-debtor, an application for the execution of his decree. If he has made an application to a Court of competent jurisdiction, although not to the Court executing the decree, he is entitled to rateable distribution without any other application, although as a matter of prudence he should notify the Court actually executing the decree of his claim. If he does not, distribution may be made by the executing Court without knowledge of the claim and he may find that the Court has parted with all the assets. The corresponding section in the Code of 1882 to this section was S. 295. Here again, the latter Code made verbal alterations, but these verbal alterations did not so far as the present case is concerned materially alter the Code of 1882.

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The adding of the explanation to S. 64 of the Code of 1908 appears to have been the result of conflicting High Court decisions. In *Ganga Din* v. *Khushali*[1], the Allahabad High Court held that an application for rateable distribution was not a claim "enforceable under the attachment" within the meaning of S. 276 of the Code of 1882, but in *Sorabji Edulji Warden* v. *Govind Ramji*[2], Telang J., held that a claim for rateable distribution did come within the purview of S. 276. Telang, J., said (page 100 of the report) :—

"I cannot doubt that the claims of those execution creditors who under S. 295 are entitled to claim the benefit of a distribution of the fruits of the attachment ought to be treated as falling within the words 'all claims enforceable under the attachment'"

The wording of the explanation follows the wording of Telang, J.'s judgment and did put an end to the controversy. Whether on a true construction of the provisions of the Code of 1882 claims for rateable distribution should have been regarded as "claims enforceable under the attachment" it is not necessary to decide. In drafting the present Code the Legislature considered that claims for rateable distribution should be included in this category and as the result added the explanation to S. 64. The Court has to decide whether an attachment in proceedings which do not result in the sale of the attached property enures for the benefit of a person who sells in other execution proceedings as the result of an attachment effected after the property has been alienated privately.

In my opinion the judgment of the Privy Council in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[3] has great bearing on the question under discussion, in fact in my opinion it really decides it. It is true that there the Judicial Committee was considering a case under the Code of 1882, but the appeal was heard in 1916, eight years after the present Code had come into force and their Lordships referred to the judgment of Telang, J., in *Sorabji Edulji Warden* v. *Govind Ramji*[2], which in effect read into S. 276 of the Code of 1882 what has now been added by the explanation to S. 64 of the present Code. In *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[3], the appellant claimed under two deeds of sale executed in her favour on the 15th July, 1907, by a judgment-debtor. The res-

1. (1885) I.L.R. 7 All. 702. 2. (1891) I.L.R. 16 Bom. 91.
3. (1916) 32 M.L.J. 425: L.R. 44 I.A. 72: I.L.R. 44 Cal. 662 (P.C).

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pondent was the transferee of a money decree obtained against the judgment-debtor on the 3rd January, 1901. He was also the transferee of a money decree obtained against the judgment-debtor on the 24th August 1896. On the 13th June 1902 execution proceedings were instituted in respect of the decree passed in 1896. These proceedings were numbered as execution case No. 8 of 1902. The property which was the subject-matter of the suit which gave rise to the appeal to the Privy Council was attached, but no further step in execution was taken here. In 1907 an application for execution of the decree of the 3rd January, 1901, was filed and this application led to the attachment of the same property on the 16th July, 1907, the day after the property had been sold privately to the appellant. The later execution proceedings, which were No. 16 of 1907, were persisted in and the property was sold to the respondent at a Court auction held on the 23rd August, 1907. The question for decision was whether the title obtained by the appellant under the two sale deeds of the 15th July, 1907, prevailed over that obtained by the respondent at the Court auction on the 23rd August, 1907. The execution proceedings of 1907 having been instituted after the alienation to the appellant the respondent was not able to say that the alienation was void as against that attachment, but he claimed that inasmuch as there was a subsisting attachment under the decree of 1896 that attachment enured to his benefit and rendered the alienation void. The Privy Council held that the respondent's title rested entirely on the attachment in the execution case No. 8 of 1907, but as the alienation to the appellant has taken place before that attachment was effected it was not void under S. 276. The respondent could not invoke S. 295 as there were no assets in Court when the alienation took place. At page 672 of the report Sir Lawrence Jenkins who delivered the judgment of the Board said:—

"But then it is urged for the decree-holder that the sales to the plaintiff, even if executed on the date the kabalas bear, are, nevertheless, void under S. 276 of the Code of Civil Procedure. That section provides that when an attachment has been made as there described any private alienation of the property attached during the continuance of the attachment shall be void against all claims enforceable under the attachment *Ex hypothesi*, the alienation to the plaintiff was not during the continuance of the attachment in execution case No. 16 of 1907, or, in other words, the attachment under which the execution sale to the decree-holder was made. Therefore it cannot be avoided by that attachment."

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Later in the judgment Sir Lawrence Jenkins said:—

"He (the respondent) relies on S. 295 of the Code of Civil Procedure as entitling him to the benefit of S. 276, and for this purpose he calls in aid his application for attachment in execution case No. 8 of 1902. To bring S. 295 into play certain conditions are necessary, and one of them is that there should be assets held by the Court. It has not been shown that there was such assets, and the indications in the record point the other way. But apart from this, S. 295 cannot help the decree-holder. Though the word "attachment" occurs three times in S. 276, the reference is to one, and only one, attachment; that one in this case is the attachment in execution case No. 16 of 1907. All that can be done is to employ that attachment for the purpose of impugning the private alienation, for it is on that alone that the decree-holder's title to the property in suit at present rests. So that even if it be assumed, for the sake of argument, that the view which prevailed in *Sorabji Edulji Warden* v. *Govind Ramji*[1] is correct, and that the conditions of S. 295 have been satisfied, it cannot advance the decree-holder's case

It still is the attachment in execution case No. 16 of 1907, that is, the only weapon of attack, and it is not made more effective by the earlier attachment in execution case No 8 of 1902. All that earlier attachment can do in the circumstances of this case is to entitle the decree-holder to the benefit of the later attachment. He cannot claim to be in a better position than the decree-holder in execution case No. 16 of 1907, nor does it strengthen his position that it is the same person who is the decree-holder in both cases. To claim a higher right because the attachment in execution case No. 8 of 1902 is of an earlier date rests on an obvious confusion of thought."

The Judicial Committee did not accept the decision of Telang, J., in *Sorabji Edulji Warden* v. *Govind Ramji*[1] as being correct, but assumed for the sake of argument that it was correct and went on to say that on this assumption the only weapon of attack was the attachment in execution case No. 8 of 1902. In other words the private alienation could only be avoided in the execution proceedings which led to the sale. The execution proceedings which led to the sale in that case were the execution proceedings in which the attachment had been effected after the alienation had taken place. As the judgment of Telang, J. in *Sorabji Edulji Warden* v. *Govind Ramji*[1] was to the effect that the words "all claims enforceable under the attachment" in S. 276 of the old Code included claims for rateable distribution and as the judgment of the Privy Council in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[2] proceeded on the assumption that *Sorabji Edulji Warden* v. *Govind Ramji*[1] had been correctly decided it seems to me that *Mina Kumari Bibi* v. *Bijoy Singh*

1 (1891) I.L.R. 16 Bom. 91.
2. (1916) 32 M.L.J. 425: L R. 44 I.A. 72: I.L.R. 44 Cal. 662 (P.C.).

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Dudhuria[1] must be regarded as having direct application in the matter now before us.

The decision in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[1] was considered by a Full Bench of this Court (Wallis, C. J., Ayling and Kumaraswami Sastri, JJ.) in *Annamalai Chettiar* v. *Palamalai Pillai*[2], and as I read the judgments the Full Bench regarded *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[1], as applying to the present Code. In *Annamalai Chettiar* v. *Palamalai Pillai*[2], a decree-holder attached land in execution of his decree. Other persons had obtained decrees against the judgment-debtor and they applied for rateable distribution without attaching the land in execution of their decrees. Subsequently the judgment-debtor alienated the land and paid off the decree-holder who had attached. It was held by the Full Bench that the other decree-holders who had applied for rateable distribution were not entitled to question the alienation under S. 64. In the course of his judgment, in which Ayling, J., concurred, Wallis, C.J., said:—

"S. 64 of the present Code affords no greater protection to the attaching decree-holder than S. 276 of the old Code, and if he cannot protect himself against an alienation after attachment unless the attached property is brought to sale in execution of the decree in respect of which the attachment was made, it necessarily follows that other decree-holders who have applied for execution cannot be in any better position."

Kumaraswami Sastri, J., who delivered a separate but concurring judgment after quoting from the judgment in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[1] said:—

"There can be little doubt that S. 64, as it stands at present, can protect decree-holders entitled to rateable distribution against private alienation only where assets have been realised, in which case they will be entitled to share the proceeds in preference to the alienee This can happen only in a very limited class of cases, *e.g.*, where the garnishee pays the attached amount into Court. In the numerous and important class of cases relating to attachment of immovable property the amendment would be of no use to decree-holders entitled to rateable distribution. Assuming that the legislature intended the attachment under S. 64 to enure for the benefit of all persons entitled to rateable distribution who had applied for execution prior to the private alienation, it has not gone far enough when it introduced the explanation to S. 64 worded as it is and made no provision for the continuance of the attachment in O. 21, in cases where the attaching creditor was paid off. The result is not very happy, but the remedy is in the hands of the Legislature."

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1. (1916) 32 M.L.J. 425: L.R.44 I.A. 72: I.L.R. 44 Cal. 662 (P.C.).
2. (1917) 33 M.L.J. 707: I.L.R. 41 Mad. 265 (F.B.).

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These observations are clearly based on *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[1] and they were made on a case under the present Code.

We have been asked to disregard the decision in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[1], because in *Nur Mohammad Peerbhoy* v. *Dinshaw Hormasji Motiwalla*[2], the Judicial Committee did not decide whether the former case had bearing on the latter. The facts in *Nur Mohammad Peerbhoy* v. *Dinshaw Hormasji Motiwalla*[2] were that on the 19th August, 1911, the property of the judgment-debtor was attached in execution proceedings, and in June of the following year it was sold in those proceedings. On the 9th August, 1912, the judgment-debtor, the first defendant, paid in the whole of the decretal amount and costs and as the result the sale was not confirmed and the execution proceedings were struck off on 1st October, 1912. Before the payment of the decretal amount, another application for execution was filed by another decree-holder and on the 10th August, 1912, the property was attached in those proceedings. On the 12th August, 1912, an application for rateable distribution was filed by the decree-holder who had instituted the latter execution proceedings but it was refused on the ground that the money which had been lodged in Court was not money realised in execution. Thereupon the second decree-holder applied for the sale of the attached property. The sale was carried out on the 25th April, 1913, and the property was purchased by the second defendant in the suit. On the 17th July, 1912, the judgment-debtor entered into a contract with the plaintiff for the sale of the same property. The suit out of which the appeal arose was a suit by the plaintiff for specific performance of the contract. Their Lordships did not think it necessary to consider whether *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[1] had any bearing on the question or whether that case was rendered inapplicable owing to the difference of phraseology of S. 64 of the present Code from S. 276 of the old Code under which that case was determined. The remarks of their Lordships in *Nur Mohammad Peerbhoy* v. *Dinshaw Hormasji Motiwalla*[2] cannot, however, be read as casting doubt on the effect of *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[1]. They can only be read as expressing their Lordships' opinion

1. (1916) 32 M.L.J. 425: L.R. 44 I.A. 72: I.L.R. 44 Cal. 662 (P. C.).
2. (1922) 45 M.L.J. 770 (P.C).

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that it was not necessary to consider the question of the application of *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[1] to the case then before them. For the purpose of answering the present reference the question of its application to the present Code has to be considered and I have stated my reasons for holding that it does apply.

The question has also been considered by the Calcutta, Bombay, Allahabad, Patna and Nagpur High Courts and they have all applied *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[1] to cases under the present Code and they have all accepted as being correct the decision of the Full Bench of this Court in *Annamalai Chettiar* v. *Palamalai Pillai*[2].

In *Provosh Chandra Mullick* v. *Debendra Nath Dutt*[3], a Division Bench of the Calcutta High Court (S. K. Ghose and Mc Nair, JJ.) had to consider a case in which the facts were these. One Monomoy Banerjee in March, 1933, obtained an attachment in execution of his money decree. On the 28th August, 1933, one Provosh Chandra Mullick, another judgment-creditor of the judgment-debtor applied for rateable distribution. On the 7th September, 1933, during the pendency of Monomoy Banerjee's attachment the judgment-debtor sold the property privately to Debendra Nath Dutta. Out of the sale proceeds Monomoy Banerjee was paid part of his decretal amount whereupon his petition in execution was dismissed and the attachment came to an end. On the 16th September, 1933, Provosh Chandra Mullick himself applied for attachment and sale of the property. The question which the Court was called upon to consider was whether the private alienation to Debendra Nath Dutta was valid. It was held that it was. Ghose, J., who delivered the judgment of the Court, said:—

"Now *Mina Kumari's case*[1] assumes that the view taken in *Sorabji Edulji Warden's case*[4] is correct and on that assumption it points out that, in order that the claims of non-attaching decree-holders for rateable distribution might be enforceable, it was necessary to bring S. 295 (now S. 73) into play, but that certain conditions should be fulfilled and one of them was that there should be assets in the hands of the Court. I fail to see how this decision can be affected by the fact that the explanation to S. 64 was not then in existence. Bakewell, J., who was one of the referring Judges in the Madras case, took the view that the Privy Council case in the decision under the old Code

1. (1916) 32 M.L.J. 425: L.R. 44 I.A. 72: I.L.R. 44 Cal. 662 (P.C.).
2. (1917) 33 M.L.J. 707: I.L.R. 41 Mad. 265 (F.B.).
3. (1935) 39 C.W.N. 1076.
4. (1891) I.L.R. 16 Bom. 91.

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was no authority on the question which was raised under the new Code with the explanation added. But the learned Judges who heard the Reference all took the view that the question was governed by the decision in *Mina Kumari's case*[1] on the principle that a claim in order to be enforceable must comply with the conditions laid down in S. 73 and that certainly is the import of the decision in *Mina Kumari's case*[1]. In that view we see no reason to differ from the decision of the Full Bench in the Madras case."

The Bombay decision is *Chindha Rupla Patil* v. *Chhaganlal Shivlal Sheth*[2]. In that case one Bhila obtained on the 13th April, 1920, an attachment before judgment. Chhaganlal, the respondent in the appeal, obtained an attachment before judgment of the same property on the 28th May, 1920. On the 8th June, 1920, the judgment-debtor sold the property to the respondent. Out of the amount of the consideration the respondent paid himself the amount due under his decree and also paid to Bhila the amount payable to him. Consequently, on the 15th June, 1920, the respondent's suit was dismissed and on the 22nd of that month, Bhila's suit was dismissed. On the 19th June, 1920, that is four days after the dissolution of the respondent's attachment by reason of the dismissal of his suit and three days before the dissolution of Bhila's attachment, Chindha Rupla Patil, the appellant, also attached the property and in the execution proceedings instituted by him the property was sold on the 1st July, 1921, at a Court auction. The respondent filed the suit out of which the appeal arose for a declaration that the property could not be sold in execution of the appellant's decree. It was held that the appellant could not claim the benefit of either of the two earlier attachments. After referring to *Annamalai Chettiar* v. *Palamalai Pillai*[3] and *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[1], Patkar, J., said:

"The attachment before judgment in the defendant's suit in execution of which the sale was held was subsequent to the alienation of the plaintiff. There were not, therefore, any claims enforceable under the previous attachments under S. 64 of the Code of Civil Procedure. It is also clear that the claim of the present defendant does not fall under the explanation to S. 64, for there were no assets held by the Court in order to entitle him to the benefit of S. 73 of the Code of Civil Procedure. It follows, therefore, that the claim of the present defendant was not a claim falling under S. 73 of the Code of Civil Procedure, and therefore, not a claim enforceable under the attachment within the meaning of S. 64 of the Civil Procedure Code. We think, therefore, that the contention of the appellant that the sale deed is void under S. 64 is not sustainable.

It is urged on behalf of the appellant that though his case might not fall strictly within S. 64, the principle of S. 64 might be applied in considering his

1. (1916) 32 M.L.J. 425: L.R. 44 I.A. 72: I.L.R. 44 Cal. 662 (P.C.).
2. (1928) 30 Bom L.R. 1488.
3. (1917) 33 M.L.J. 707: I.L.R. 41 Mad. 265 (F. B.).

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claim under the attachment of 19th June, 1920. The argument cannot be accepted. According to the decisions in *Jetha Bhima & Co.* v. *Lady Janbai*[1] and *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[2], the sale deed in favour of the present plaintiffs cannot be affected by the attachment of the defendant which was levied eleven days after the sale deed. The previous attachments must be considered to have been withdrawn on account of satisfaction of the claims in respect of which the attachments were effected. The moment the attachment comes to an end by reason of satisfaction of the decree, all claims under the attachment cease to be enforceable." (See *Khushalchand* v. *Nandram Sahebram*[3])

Baker, J., concurred in the judgment of Patkar, J.

The Allahabad High Court considered *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[2] and *Annamalai Chettiar* v. *Palamalai Pillai*[4], in *Mehar Chand* v. *Joti Prasad*[5]. There one Roop Chand obtained a money decree and attached the immovable property of the judgment-debtor in March, 1927. On the 8th June, 1927, Joti Prasad who had also obtained a money decree against the judgment-debtor applied for rateable distribution. On the 21st January, 1928, the property was sold in pursuance of Roop Chand's attachment. On the 21st February, 1928, the judgment-debtor sold the property privately to one Lala Mehar Chand and out of the sale proceeds paid off the amount due to Roop Chand under his decree. The sale in execution was consequently set aside. On the 28th February, 1928, Joti Prasad without filing a separate application for execution, but merely relying on his application for rateable distribution asked the Court to sell the property, which the Court did and confirmed the sale on the 31st July, 1928. Lala Mehar Chand then filed a suit for a declaration of his title and succeeded. Rachpal Singh, J., in the course of his judgment referred to *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[2] and *Annamalai Chettiar* v. *Palamalai Pillai*[4] and quoted with approval from the judgment of Wallis, C.J., in the latter case. Sulaiman, C. J., who concurred in the judgment of Rachpal Singh, J., considered that the explanation to S. 64 emphasises that the private alienation which has to be void must be "contrary to such attachment."

The Patna High Court applied *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[2] and approved of *Annamalai Chettiar* v.

1. (1912) I.L.R. 37 Bom. 138.
2. (1916) 32 M.L.J 425: L.R. 44 I.A 72: I.L.R. 44 Cal. 662 (P. C.).
3. (1911) I.L.R. 35 Bom. 516.
4. (1917) 33 M.L.J. 707: I L.R. 41 Mad. 265 (F.B.).
5. (1935) 33 A.L.J. 4.

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Palamalai Pillai[1] in *Radha Mohan* v. *Musammat Wahidan* and the decision of the Nagpur High Court to the same effect was given in *Kastur Chand* v. *Wazir Begum*[3].

The learned Judges who have made this reference have indicated that in their opinion S. 64 is sufficiently widely worded to give Pedda Sambayya Chetty the benefit of Appu Chetty's attachment. They have read S. 64 as operating to protect all judgment-creditors who have applied for execution before any assets of the judgment-debtor are brought into Court, irrespective of the fact that the attachment which results in the sale has been effected after the private alienation. If it were the intention of the Legislature to embody in the Code this broad principle, the language used has not effected it and the Court can only have regard to the language used. I am unable, however, to accept the proposition that the Legislature had in mind what the learned Judges consider it had in mind. The principle which they say is expressed in S. 64 is a principle which runs contrary to the common law and contrary to the provisions of the Code of Civil Procedure of 1859. Under S. 270 of that Code the creditor who attached first was given priority. He was entitled to be paid in full. S. 271 provided merely for the rateable distribution of the balance. It seems to me more probable that the Legislature has said what it intended to say. The learned Judges, while they have considered the decisions in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[4] and *Annamalai Chettiar* v. *Palamalai Pillai*[1] have not examined the decisions of the other High Courts which have applied the judgment in the former case to the present Code and have approved of the judgments in the latter case. The learned Judges were impressed by the decision in *Durga Churn Rai Chowdhury* v. *Monmohini Dasi*[5]. In that case the Calcutta High Court accepted the view of the Allahabad High Court in *Ganga Din* v. *Khushali*[6] and observed that to hold that claims under S. 295 of the Code of 1882 were claims enforceable by attachment against which assignments made under S. 276 were void, would perhaps be carrying out the

1. (1917) 33 M.L.J. 707: I.L.R. 41 Mad. 265 (F.B.).
2. (1934) I.L.R. 13 Pat. 446.
3. I.L.R. (1937) Nag. 291.
4. (1916) 32 M.L.J. 425: L.R. 44 I. A. 72: I.L.R. 44 Cal. 662 (P.C.).
5. (1888) I.L.R. 15 Cal. 771.
6. (1885) I.L.R. 7 All. 702.

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intention that might have been in the mind of the Legislature when the old Code, which did not provide for a rateable distribution, was suddenly modified by the introduction of that perfectly new principle, but the sections of the Code relating to execution were not re-cast so as to be fully adapted to the new state of things, and it appeared to the learned Judges who decided *Durga Churn Rai Chowdhury* v. *Monmohini Dasi*[1], that in this respect S. 276 had not been successfully framed with the object of protecting rateable distribution amongst claimants under S. 295. With the addition of the explanation to S. 64 of the present Code, the learned Judges who have referred the present question have indicated that in their opinion the section has been framed in such a way that all claimants for rateable distribution have been protected, notwithstanding that the proceedings leading to the sale of the judgment-debtor's property have been instituted after the private alienation. They say that otherwise the protection which the Legislature intended to afford to claimants for rateable distribution would be meaningless. Their argument, however, overlooks the fact that were it not for the explanation the controversy which led to conflicting decisions would remain unsettled. With great respect I am unable to share the opinion expressed in the Order of Reference.

The answer that I would give to the reference is this. S. 64 provides that where a property has been attached any subsequent alienation is void against all claims enforceable under that particular attachment, but it does not go beyond this. An attachment effected after a private alienation is not assisted by an attachment before the alienation. If the execution proceedings in which the second attachment has been made, have been instituted before assets have been brought into Court, the creditor will be entitled to rateable distribution if the property is sold in the earlier execution proceedings, but if the sale takes place as the result of the attachment effected after the private alienation a person who buys the property at the Court auction will not obtain a good title.

I would make the costs of this reference costs in the appeal.

Pandrang Row, J.

Pandrang Row, J.—I agree with my Lord.

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1. (1888) I.L.R. 15 Cal. 771.

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Patanjali Sastri, J.—I agree with the answer given by my Lord the Chief Justice.

Abdur Rahman, J.—The question to decide is whether the mortgage executed by the judgment-debtors was, in the circumstances mentioned, valid as against the appellant who had purchased the property in Court sale in course of execution (E. P. No. 322 of 1926). It has been contended on behalf of the appellant that inasmuch as the mortgage deed was executed by the judgment-debtors in favour of the respondent during the subsistence of the attachment effected in April 1925 and by making his application for execution (E. P. No. 322 of 1926) the second decree-holder's claim had become enforceable under the said attachment, the mortgage must be held to be void as against the appellant. This necessitates an examination of the provisions contained in Ss. 64 and 73 of the Code of Civil Procedure. To take up S. 73 first, it provides that:

"Where assets are held by a Court and more persons than one have, before the receipt of such assets, applied to the Court for the execution of decrees against the same judgment-debtor, the assets shall be rateably distributed amongst all such persons."

In other words it provides for rateable distribution of assets held by a Court amongst those unsatisfied holders of decrees for money who have applied to the Court for execution before the assets have been received by the Court. It may be observed that this section was amended by the Code of 1908 and is not confined in its operation to the assets which are realised by sale or by any other process in execution. It is immaterial now how the assets are received by a Court so long as they are held by it although the Court may have done nothing to realise them. Whatever argument might have been advanced before the amendment of this section in regard to the assets realised by sale or otherwise in execution of a decree being distributable between the creditors rateably, it cannot now be contended that that it is only the assets which have been realised in that manner that are capable of being distributed under S. 73 of the Code of Civil Procedure. This would suggest that the connection existing between an attachment and sale of the property by Court before 1908 was done away with by the amendment made in the present section. A perusal of the language of this section would also show that it does not require a decree-holder to make

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an application for a rateable share in the assets. Indeed it has been held that a simple application for a rateable distribution is not enough and would not entitle the petitioner to get the same.

"The duty of distribution is", as observed by Varadachariar, J., in *V.E.N.K.R.M.V.R.M. Somasundaram Chettiar* v. *Alamelu Achi*[1]:

> "Cast on the Court whenever 'more persons than one' have applied for execution of decrees passed against the same judgment-debtor."

No assets can, it is true, be distributed before they are received by the Court and that is how the section has been drafted, but the claim to receive a rateable share must have been in existence and made before they are so received and it is the claim made before the receipt of assets by putting in an application for execution which entitles a decree-holder, who has a money decree against the judgment-debtor, to receive his share. If a decree-holder does not apply for execution before the receipt of assets by the Court, he cannot obviously get a rateable share of the assets under this section, although they could be actually distributed only after they had been received by Court.

A judgment-debtor loses the power of alienating his rights in the property on its attachment to the extent of the claims enforceable under the attachment. This is a legal consequence of the attachment and should have been provided, as it is in fact provided by the Code, before an application for execution entitling a person to a rateable share could be thought of. That is why in the scheme of the Code S. 64 precedes S. 73.

So far as this case is concerned an attachment of the property in dispute was effected on the 14th April, 1925, in the first instance in E.P. No. 132 of 1925 and an application for execution was made by the decree-holder in O.S. No. 237 of 1925 to the same Court during the subsistence of the above attachment and before the receipt of any assets by that Court. The question is if the second application for execution (E.P. No. 322 of 1926) must be held to be inconsequential or useless for the purposes of S. 64 of the Code of Civil Procedure simply because the execution Court did not proceed to sell the property in pursuance of the attachment effected in April, 1925, but did

1. (1937) M.W.N. 480.

so under the later attachment made in June, 1926. This takes me to S. 64 of the Code of Civil Procedure which reads as follows:—

"Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation:—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets."

This section renders a private transfer of a property or of any interests therein during the continuance of an attachment ineffectual as against all claims enforceable under the attachment if the transfer was contrary to such attachment.

Without taking the decided cases into consideration and placing a purely grammatical construction on the words of the section my answer to the question whether an alienation is hit by this section would depend on the reply to the following questions:—

(*a*) Was there an attachment?

(*b*) Was the alienation contrary to (such) attachment or did it affect any claim enforceable under such attachment?

If the answers to the above questions happen to be in the affirmative, I would say that the transfer was invalid as against the persons whose claims were enforceable under the attachment. It cannot be disputed that a transfer by a judgment-debtor after an attachment at the instance of an attaching creditor would be contrary to the attachment effected at his instance, and to use the language of the section, 'void' as against him. The question is if it would also be 'void' as against the claims of the persons who did not attach but had merely applied for execution after the first attachment although before the receipt of assets and had thus become claimants for a share in the rateable distribution of the assets under S. 73 of the Code of Civil Procedure. There is no doubt that if they had asked for attachments in their applications they would have got them and any alienation contrary to such attachments would not have effected these decree-holders. This would have caused multiplicity of proceedings and meant unnecessary duplication of legal machinery in issuing several attachments. Are the claimants for rateable distribution then to be debarred from getting the protection which attachments in

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their own applications for execution would have afforded them, and do they not by making an application for execution get an additional advantage of going back to the date of the first attachment effected at the application of another decree-holder and saying that any alienation by the judgment-debtor after the first attachment would not be voidable at the instance of the first decree-holder alone but at their instance as well?

In adding the Explanation to S. 64, I feel that the Legislature has, instead of confining the benefit of the attachment to the attaching creditor only, extended it to such other creditors also whose claims were *'enforceable'* under the attachment. The use of the word 'enforceable' in S. 64 is very significant. It means 'capable of being enforced' and has to be distinguished with the word 'enforced'. As soon as an application for execution is made by a person holding a decree for the payment of money against a judgment-debtor to the Court which had already attached the property of the same judgment-debtor, the person making the application for execution would be entitled to rateable distribution if the application was made before the receipt of assets and his claim or decree would be *enforceable* under the attachment although it would not be *enforced* until the assets were actually received in Court. But we are not considering any question of actual distribution of assets, for which their receipt is naturally a condition, but the effect of such an application under S. 64 of the Code of Civil Procedure. A claim for rateable distribution has now been included, by the explanation to S. 64 in the claims enforceable under an attachment. It would therefore follow that as soon as an application for execution is made by a person in circumstances which would entitle him to claim rateable distribution, his claim would fall within the category of claims enforceable under the attachment. He would then be entitled to claim the benefit of S. 64 and to treat the alienation of the property by his judgment-debtor as 'void' not only against the attaching creditor but also as against himself. In other words, if the alienation by his judgment-debtor was contrary to the attachment effected at the instance of the attaching creditor, it would be void as against his claim which has by virtue of the Explanation become enforceable under the attachment. For ascertaining the effect of S. 64, it appears to be unnecessary to consider whether the assets were actually realised by the Court subsequently or not. This may be

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vital when the Court wishes to dispose of the various applications and distribute the assets but has, to my mind, no bearing on the validity or otherwise of the alienation made pending an attachment. But it has been contended that unless the attachment effected on the property results in a sale, the application for execution which would entitle a party to rateable distribution could not be brought within S. 73 of the Code of Civil Procedure and would not therefore entitle him to take advantage of the attachment effected at the instance of the attaching creditor. S. 73 provides how the assets are to be actually distributed and has thus to define persons who are entitled to share in the rateable distribution but it is beyond the province of that section to say as to what the effect of an attachment would be on an alienation not only in regard to the attaching creditor but also in regard to the claims of persons who are entitled to a share in the rateable distribution. For this purpose we will have to go to S. 64; but there is nothing in that section which makes the sale of property or even the receipt of assets as a condition precedent for either the validity of the attachment or for voidability of the alienation effected during its pendency. The explanation to S. 64 makes it clear that for the purpose of that section, there would be no difference between an attaching creditor and an applicant for rateable distribution. The claims of both have been declared now to be enforceable under the attachment. If that be so, where is the justification for adding a condition that the first attachment should necessarily have resulted in a sale failing which another decree-holder, who was not the attaching creditor, could not take advantage of the attachment effected before he made his application for execution and could not impugn the transfer of property made by the judgment-debtor during the subsistence of that attachment?

It was argued on behalf of the respondent that their Lordships of the Privy Council take the view in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[1] that such a sale in the first attachment is essential and hold that,

"to bring S. 295 into play certain conditions are necessary and one of them is that there should be assets held by the Court."

On these assumptions it was contended that since the property was not sold in E. P. No. 132 of 1925 and there were

1. (1916) 32 M.L.J. 425: L.R. 44 I.A. 72: I.L.R. 44 Cal. 662 (P.C.).

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not assets held by the Court in that execution, the decree-holder cannot be said to have complied with one of the essential conditions of S. 73 of the present Code and cannot take advantage of the provisions contained in that section. I shall consider the question whether the saleof the property under attachment is a condition precedent before a subsequent decree-holder can take advantage of S. 64 of the Code when I am examining the Full Bench decision in *Annamalai Chetti* v. *Palamalai Pillai*[1], but should like to observe at this stage that a claim for rateable distribution was not included in the claims enforceable under an attachment in the Code of Civil Procedure of 1882, under which the decision was given by their Lordships and in the absence of such a provision the applicability of S. 295 of the old Code was made to depend on the condition that the assets were held by the Court. S. 295 of the old Code provided and its successor S. 73 in the present Code now provides for the actual distribution of assets amongst the various decree-holders under certain conditions and one of these conditions was held by their Lordships to be the actual presence of assets in Court. But the effect of the decree-holder being a claimant of a share for rateable distribution was not considered by their Lordships as on the date (that is, 16th June, 1907) on which he had in that case made an application for execution No. 16 of 1907, the attachment effected in Execution Case No. 8 of 1902 had come to an end by virtue of an order passed on the 29th March, 1905 and the private alienation of the property had been effected by the judgment-debtor more than two years after, that is, on the 15th July, 1907. How could the decree-holder call in aid then his application for attachment in Execution Case No. 8 of 1902 when the attachment had ceased to exist in 1905 and the other application for execution of another decree was not made by him prior to the alienation of the property by the judgment-debtor? The prior attachment was not taken into consideration as it had ceased to exist in 1905 and the subsequent attachment was considered to be of no avail as the alienation by the judgment-debtor was before the second application for execution was made. It cannot therefore be said that their Lordships were called upon to decide or decided that an application for execution would or would not entitle a

1. (1917) 33 M.L.J. 707: I.L.R. 41 Mad. 265 (F.B.).

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person to take advantage of a subsisting prior attachment effected on the property; although it may be conceded that in the absence of the Explanation the argument that on a subsequent application for execution a decree-holder would have been able to claim that advantage was in spite of Telang J.'s decision in *Sorabji Edulji Warden* v. *Govind Ramji*[1] a little far fetched. It will also be observed that although a reference was made to S. 64 of the present Code by one of the Counsel in his arguments, their Lordships appear to have scrupulously avoided any reference to that section apparently because the law applicable to the facts of that case was what existed before 1908 and they must have evidently considered it unnecessary to consider the effect of the addition of the explanation to S. 64 of the Code of Civil Procedure in that case. It is needless to add that the Privy Council decision is no authority on the facts of the present case where the first attachment was in force both when the alienation was made by the judgment-debtor and when the application for execution was made by the second decree-holder. In these circumstances it is impossible to ignore the addition of the Explanation to S. 64 of the present Code. In fact when a similar question came up for consideration before their Lordships in *Nur Mohammad Peerbhoy* v. *Dinshaw Hormasji Motiwalla*[2], they happen to observe:

"The point raised by the learned Judge seems to their Lordships to be one of considerable difficulty, and not as easily to be disposed of as was done by the learned Judges of the Court of Appeal. In particular, it would have to be considered whether what was said in the case of *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[3] has any bearing on the question, or whether that case is rendered inapplicable owing to the difference of phraseology in S. 64 of the Code of Civil Procedure of 1908 from S. 276 of the Code of Civil Procedure of 1882, under which that case was determined. It would also have to be considered whether at any given moment the plaintiff was able to get specific performance. Their Lordships, if it had been necessary to determine these questions, would have required further argument. But they do not now think it necessary to decide the question, because they think the plaintiff's case fails on another ground."

The next case on which reliance was placed by the learned Counsel for the respondent is a Full Bench decision of this Court in *Annamalai Chetti* v. *Palamalai Pillai*[4], which was on a difference between Seshagiri Aiyar, J. and Bakewell, J.,

1. (1891) I.L.R. 16 Bom. 91. 2. (1922) 45 M.L.J. 770 (P.C.).
3. (1916) 32 M.L.J. 425: L.R. 44 I.A. 72: I.L.R. 44 Cal. 662 (P.C.)
4. (1917) 33 M.L.J. 707: I.L.R 41 Mad. 265 (F.B.).

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referred to a Bench of three learned Judges. This case has been followed by various High Courts and it was with the object of reconsidering this decision that the present Bench was constituted. The question for reference in that case was:

"Whether non-attaching decree-holders who have applied for rateable distribution under a subsisting attachment *which has since been raised* by the satisfaction of the decree or otherwise are entitled to question a private alienation made during the continuation of such attachment."

The answer to this question was given by the Full Bench in the negative and in view of the fact that the attachment was raised by the satisfaction of the decree, learned Counsel for the appellant appeared to concede that the decision might have been justified on its own facts but he asked us to reconsider the reasons given by the learned Chief Justice and another learned Judge of this Court. Coming now to the Full Bench case we find that starting with the proposition that the decree-holders other than the attaching decree-holders acquired no right to rateable distribution under S. 295 (now S. 73) of the Code until assets had been realised or as it might now be said received, a statement to which no exception could be taken—the learned Chief Justice observed that the Judicial Committee seemed to have held in *Mina Kumari's case*[1];

"that the attaching decree-holder himself cannot object to a private alienation by the judgment-debtor subsequent to the attachment *unless the attached property has been brought to sale in execution of the decree in respect of which the property was attached.*"

Now if I may say so with great respect to the learned Chief Justice, the relevant observation made by Sir Lawrence Jenkins at page 672 towards the end of the following passage was not correctly appreciated:—

"But then it is urged for the decree-holder that the sales to the plaintiff, even if executed on the date the kobalas bear, are nevertheless void under S. 276 of the Code of Civil Procedure. That section provides that when an attachment has been made as there described any private alienation of the property attached during the continuance of the attachment shall be void against all claims enforceable under the attachment. *Ex hypothesi*, the alienation to the plaintiff was not during the continuance of the attachment in execution case No. 16 of 1907, *or, in other words, the attachment under which the execution sale to the decree-holder was made.* Therefore it cannot be avoided by that attachment."

If I understand the observation correctly, Sir Lawrence Jenkins after describing the provisions of S. 276 of the old Code applied the same to the facts before him and said that the

1. (1916) 32 M.L.J. 425: L.R. 44 I.A. 72: I.L.R. 44 Cal. 662 (P.C.).

alienation to the plaintiff could not *ex hypothesi* be affected as it was not made "during the continuance of the attachment in Execution Case No. 16 of 1907." Had he stayed here, his observations could not have been misunderstood but in order to make himself clearer in regard to the attachment to which he was referring he added:

> "*or in other words* the attachment under which the execution sale to the decree-holder was made."

I cannot understand Sir Lawrence Jenkins to be laying down what the learned Chief Justice felt he was. The expression 'or in other words' is important and was undoubtedly employed by his Lordship to avoid any possibility of mistake in regard to the attachment to which a reference was made just before. It must not be overlooked that in that case the alienation had been effected on the 15th July, 1907, while the application for execution No. 16 of 1907 was presented a day later, that is, on the 16th July, 1907 and the attachment under which the sale to the decree-holder was made must have been effected subsequently. Again the learned Chief Justice's observation in the next sentence that,

> "the decree-holder was held not to be entitled to defend his title as against the alienee from the judgment-debtor under S. 276 by relying on the fact that before the date of the alienation he had attached the suit property in execution of another decree *without bringing the property to sale in execution of that decree*",

does not seem to be correct. The italicised words do not appear in the Privy Council decision and the decree-holder was held not to be entitled to defend his title as against the alienee by relying on the previous attachment simply because it had ceased to exist in March 1905 and not because the property was not brought to sale in execution of that decree.

The observation in the next paragraph that,

> "S. 64 of the present Code affords no greater protection to the attaching decree-holder than S. 276 of the old Code and if he cannot protect himself against an alienation after attachment *unless the attached property is brought to sale in execution* of the decree in respect of which the attachment was made, it necessarily follows that other decree-holders who have applied for execution cannot be in a better position,"

is based upon the same misconception in regard to the actual sale of the property, which is nowhere to be found in the Privy Council decision. It is not contended that S. 64 places the decree-holders who have applied for execution subsequently in any better position than that of the attaching creditor. The

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section places both the attaching creditor and other decree-holders who have applied for execution in the same position so far as the alienation of the attached property is concerned and if the alienation is made during the continuance of the attachment it would be voidable not only against the attaching creditor but also against the other decree-holders. It appears to me, although it is not quite necessary to decide it in this case, that the attaching creditor cannot after the addition of this Explanation steal a march over the other decree-holders and the judgment-debtor cannot, by paying to the attaching creditor alone, free the property from the claims of those who have already applied for execution during the subsistence of the first attachment. Anyhow even if one may not go to that length, it is at least clear that by adding the explanation to S. 64 the Legislature has succeeded in sufficiently expressing itself and declaring the alienations to be ineffectual not only against the attaching creditors but even against those who were entitled to rateable distribution under S. 73 of the Code of Civil Procedure. It is true that the words 'contrary to attachment' used in S. 64 in the present Code are narrower, hence more exact, than the words 'during the continuance of attachment' occurring in S. 276 of the old Code and were taken from the judgment of their Lordships of the Privy Council in *Dinobundhu Shaw Chowdhury* v. *Jogmaya Dasi*[1], but this does not mean that S. 64 is less favourable now than its corresponding provision in the previous Code in other respects. The Explanation to this section has, indeed, by bringing the decree-holders other than the attaching creditors in the category of persons whose claims are enforceable under the attachment made it more difficult for the judgment-debtor to alienate the attached property without paying his debts for which decrees have been obtained and applications for execution presented. It may be that as a result of payment by the judgment-debtor to the attaching creditor or on the latter's certifying the satisfaction of his decree in accordance with the provisions of O. 21, r. 55 or on account of a default of the decree-holder as mentioned in O. 21, r. 59 of the Code of Civil Procedure the attachment may cease or be deemed to have been withdrawn, but this does not mean that it is not capable of being revived at the instance of the other decree-holder and even if it is held to be incapable of being

1. (1901) 12 M.L.J. 73: L.R. 29 I.A. 9: I.L.R. 29 Cal. 154 (P.C.).

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brought to life—a point which does not arise for determination in this case as the attachment was never withdrawn here and still stands—there appears to be no reason to hold that the alienation would not be void as against those who had become by making applications for execution entitled to rateable distribution. This is the plain language of the section when it is read with the explanation and there appears to be no reason why a grammatical construction should not be placed on the words of that section particularly when by placing that interpretation the apparent intention of the Legislature in adopting the suggestion made in *Durga Churn Rai Chowdhury* v. *Monmohini Dasi*[1] and giving effect to it by adding the explanation to S. 64 is fulfilled.

Let me consider the case by giving an illustration from a slightly different point of view. *A* obtains a decree against *B* in the Court of a District Munsif on the 1st March, 1930 and the decree-holder in execution of that decree attaches *B's* property in April, 1930. But before the property is brought to sale, *C* gets a decree on the 1st July, 1930, against *B* in the Court of a Subordinate Judge and attaches it a fortnight later. There is no doubt that under the provisions of S. 63 of the Code of Civil Procedure it will be the Court of the Subordinate Judge out of the two Courts which would be entitled to realise *B's* property or determine any claim thereto. Let us also suppose that *B* had alienated the attached property in May, 1930, to a third party. It cannot be disputed that the alienation would not be binding on *A*. *C* then applies to the Subordinate Judge for the sale of the property in July, 1930. It is clear from the provisions of S. 63 of the Code of Civil Procedure that it is the Subordinate Judge who would be entitled to bring the property to sale and realise the sale proceeds. The District Munsif would have to stay his hands and cannot after knowing of the attachment by a higher Court proceed to bring the property to sale. Is the alienation voidable against *A* only in the circumstances or against *C* as well? Obviously against both and that only because *A* who was the first attachment creditor has now been placed in the position of a claimant for rateable distribution and the sale must be held in accordance with the provisions of S. 63 of the Code of Civil Procedure by the Subordinate Judge in the decree obtained by *C* although for the benefit of

1. (1888) I.L.R. 15 Cal. 771.

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both *A* and *C*. It was held by a Division Bench of this Court in *Narasimhachariar* v. *Krishnamachariar*[1], to which Wallis, J., as he then was, was a party that when a property was attached by different Courts and money was realised in accordance with S. 63 of the Code of Civil Procedure by the Court of the highest grade, the attaching creditors would be entitled to share rateably irrespective of the fact that their decrees have not been transferred to that Court. In delivering the judgment of the Court he put the following question to himself:

"What however when the attachments are in different Courts and the property is received or realised by the Court of the highest grade under S. 63."

He then gave the following answer:

"In such a case there is no receipt at all by the other Courts unless the receipt by the Court of the highest grade can be deemed to be a receipt by the other creditors as well. In my opinion this is the correct view,"

and added later:

"The difficulty is obviated if the payment into the Court of the highest grade is treated as payment into Court in all the suits and this in my opinion is the true construction of S. 63. . . . ."

If the payment as held in the above case is to be regarded as payment in the illustration given by me in the decrees passed in favour of *A* and *B*, both of them will share rateably and will stand exactly in the same position. It was in the latter execution (E. P. No. 322 of 1926) that the property was sold. The first decree-holder in O.S. No. 497 of 1923 actually applied for rateable distribution in E.P. No. 322 of 1926 and got a share of the sale proceeds. It was exactly what the decree-holder of the District Munsif's Court would have done in the illustration above. The position would have been the same even if the property was sold, in the illustration by the District Munsif. The Subordinate Judge could have chosen to accept the sale and asked the District Munsif to transfer the sale proceeds to his Court. The alienation not being binding on *A*, the whole property would have been sold by the District Munsif. Once the sale proceeds were received by the Subordinate Judge, they would have been distributed by him amongst the various holders of decree in accordance with the provisions contained in S. 73 of the Code of Civil Procedure. But the point is that *A* the holder of the decree in the District Munsif's Court would have

1. (1914) 26 M.L.J. 406.

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come to the Subordinate Judge's Court as a claimant for rateable distribution and the alienation which was effected by his judgment-debtor after his attachment would have been avoidable not only against him but also against *C*.

A number of cases were cited during the course of arguments by the learned Counsel for the respondent in support of his contention that the appellant could not assail the alienation by the judgment-debtor during the continuance of the first attachment successfully (vide *Bhupal* v. *Kundan Lal*[1], *Mehar Chand* v. *Joti Prasad*[2], *Provosh Chandra Mullick* v. *Debendra Nath Dutt*[3], *Chindha Rupla Patil* v. *Chhaganlal Shivlal Sheth*[4], *Radha Mohan* v. *Musammat Wahidan*[5] and *Kastur Chand* v. *Wazir Begum*[6]) and they have to be examined to ascertain the extent to which they help him. Having gone through them carefully, however, I am of opinion that they cannot be regarded as authorities in the present case where attachment has continued to subsist on all material dates and has not been removed really up to this day. In all the cases on which the reliance was placed by the learned Counsel for the respondent the alienations were not found to be contrary to the attachments which had ceased to exist either by orders of Court or by operation of law under O. 21, r. 55 of the Code of Civil Procedure on the dates on which the alienations were made or on the dates on which the applications were presented by other decree-holders who but for such cessation would have been entitled to rateable distribution. Let me now examine these cases.

In *Bhupal* v. *Kundan Lal*[1], the decree in favour of the attaching creditor was satisfied on the 2nd April, 1913 and under the provisions of O. 21, r. 55 the attachment must be deemed to have come to an end on that date. The private alienation was made on the 26th May, 1913, while the second attachment in which the property was sold was made on the 20th June, 1913. In a case like this it could not be urged that the alienation was made during the subsistence of the first attachment and there was no scope for the application of the Explanation to S. 64.

In *Mehar Chand* v. *Joti Prasad*[2], the attaching decree-holder was paid privately on the 21st February, 1928, by the sale of the property. Although the subsequent decree-holder had applied

1. (19_1) I L.R. 43 All. 399.
2. (1935) 33 A.L.J. 4.
3. (1935) 39 C W.N. 1076.
4. (1928) 30 Bom.L.R. 1488.
5. (1934) I.L.R. 13 Pat. 446.
6. I.L.R. (1937) Nag. 291.

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for rateable distribution in June 1927, yet on the decree being satisfied the attachment came to an end and, the subsequent decree-holder who purchased the property in July 1928 without any further attachment, was held not to be entitled to defeat the title of the purchaser who had bought the property in February, 1928. This case might have been of use to the respondent if the attachment had in the present one ceased to exist but cannot help him when the attachment was in existence at the time the property was purchased by him. This case is an authority against the extreme contention that a claimant for rateable distribution, who would have been entitled to get a share if the assets had come into Court, is still entitled to contest the alienation either on the ground that the attachment has not in spite of the attaching creditor's satisfaction come to an end or that his claim had become enforceable under the attachment at the time when it was existing and cannot be defeated by paying the attaching creditor out of Court. It is unnecessary to say anything about this position in this case but the view taken in the Allahabad case may be capable of being defended on the ground that the existence of an attachment is *sine quo non* for the claimant for rateable distribution to attack the alienation successfully. The learned Chief Justice, it may be noted, agrees that if a private alienation is contrary to an attachment, claimants for rateable distribution of the assets would be equally protected. He then proceeded to say at page 11:—

"It would follow therefore that where the attachment has not fallen to the ground but subsists and property has been sold in pursuance of it, the assets which are realised are liable to be distributed among the decree-holder as well as the claimants for rateable distribution, in spite of the fact that a private alienation has previously taken place."

This is all right so far as it goes but he does not take into consideration the case where the property has not been sold in spite of the subsistence of the attachment. The next sentence in his judgment deals with a case where the attachment has fallen to the ground. The result is that a case such as the present one was not considered by him. But the only sentence in his judgment to which one may with great deference take exception appears in the next paragraph. He says:

"It would be impossible therefore to hold that there are claimants for rateable distribution of assets before any assets have been received."

The only reason which he gives for this conclusion is that S. 73 does not make it necessary for a decree-holder to make

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any formal application for a rateable share in the assets and an application for execution is all that is required. He therefore states that there may be cases where no formal application for rateable distribution may have been made. I concede that there would be. But then follows the conclusion which has been noted above. With great deference to the learned Chief Justice I am not prepared to agree that this conclusion follows from the premises enunciated by him. The relief of rateable distribution need not have been asked for but has to be granted if an application for execution has been given by a decree-holder before the assets are received by the Court. The result of his being a claimant for rateable distribution would follow from the application for execution which he has made and not from the fact that the relief has been eventually granted to him or that the Court has been, on the receipt of assets, placed in a position to grant the relief to him. The distinction between a claimant and a recipient should not be lost sight of.

In *Provosh Chandra Mullick* v. *Debendra Nath Dutt*[1], the application for execution by the subsequent decree-holder was made on the 28th August, 1933, but the previous attachment came to an end on the 7th September, 1933, as the decree-holder at whose instance the attachment was effected was paid privately. It is therefore similar to the case in *Mehar Chand* v. *Joti Prasad*[2] and does not advance the position any further.

In *Chindha Rupla Patil* v. *Chhaganlal Shivlal Sheth*[3], two attachments before judgment were obtained by two persons. The judgment-debtor sold the property on the 8th June, 1920, to pay off these two persons. A third creditor brought a suit and obtained attachment before judgment on the 19th June, 1920 and after obtaining his decree got the property sold through Court and purchased it himself. It was held that he could not avail the title of the purchaser who had purchased the property for payment to the first two attaching creditors and in any case before the third person had applied for attachment. It was also observed in the case that:

"Under O. 38, r. 10 of the Civil Procedure Code the attachment before judgment could not affect the rights existing prior to the attachment, of persons not parties to the suit."

The plaintiffs were not parties to the third suit and the private sale in their favour could not be said to have been

1. (1935) 39 C.W.N. 1076. 2. (1935) 33 A.L.J. 4.
3. (1928) 30 Bom.L.R. 1488.

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contrary to the attachment before judgment in the defendant's suit.

In *Radha Mohan* v. *Mst. Wahidan*[1], a property was attached by a decree-holder on the 17th December, 1930. The property was sold privately by the judgment-debtor on the 29th January, 1931, while the attachment was subsisting. The same decree-holder got another decree against the same judgment-debtor subsequently and applied for rateable distribution on the 11th May, 1931. But before the sale the purchaser applied to the Court offering to pay the decretal amount and costs in the first execution case and to have the property released from attachment. The decree-holder agreed to this course and the first execution case was struck off on full satisfaction and the attachment was released. The decree-holder contended (*i*) that the amount deposited must be considered to be 'assets' held by the Court and liable to rateable distribution and that therefore neither the first nor the second decree could be said to have been satisfied and (*ii*) that the private sale of the property was void as against the claim under both the decrees. This case was decided on the question of consent given by the decree-holder to the deposit of the decretal amount and on his failure to raise any objection in the execution proceeding. But on principle it does not go further than the Allahabad or the Calcutta cases cited above. In view of the fact that the attachment had come to end, the same decree-holder who was asking for rateable distribution could not assail the alienation. What would have been the result if the attachment had not ceased, this case does not decide.

The last case was the one reported in *Kastur Chand* v. *Wazir Begum*[2]. The facts in this case were that a property was attached on the 14th June, 1926. The judgment-debtor made a gift of the same on the 19th May, 1927, although it was not registered till the 13th July, 1927. In the meantime however another decree-holder attached the same property on the 11th July, 1927. It was held in that case that the gift of the property was completed in May, 1927. It is not stated in this case when the first attachment was removed although it is stated at the top of page 297 that it continued after July, 1927.

1. (1934) I.L.R. 13 Pat. 446.
2. I.L.R. (1937) Nag. 291.

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Relying on the decision in *Annamalai Chettiar* v. *Palamalai Pillai*[1], the learned Chief Justice observed that:

"According to that decision a person in a position similar to the decree-holders here is not entitled to rely on a third party attachment even where the proceeding has reached the stage of an application for rateable distribution."

He adds:

"Here there is no application for rateable distribution, so that there are two links at least missing in the chain: (1) the attaching creditor under the attachment made in 1926 never got the assets into the executing Court; and (2) the present attaching creditor under the attachment in 1927 never applied for rateable distribution. That earlier attachment was subsequently raised and passes out of the story."

From what has been stated above, it would appear that the earlier attachment was not raised until after July, 1927, but it was raised subsequently. If it was raised, the decision could be justified on the ground that the subsequent decree-holder could not object to the alienation made prior to his attachment when the first attachment was raised and had passed out of the story. The reasons given by the learned Chief Justice however are not convincing. The subsequent decree-holder under whose decree the property was attached in 1927 need not have applied for rateable distribution at all. This matter has been dealt with in an earlier portion of this judgment. As for the other reason given by the learned Chief Justice that the attaching creditor under the attachment made in 1926 never got the assets into the executing Court, I have already expressed my opinion that it is not necessary for the purposes of S. 64 that the property should have been sold or that the assets must have come into the executing Court although this may be necessary for the purposes of S. 73.

In almost every case cited above a reference has been made to *Annamalai Chettiar* v. *Palamalai Pillai*[1], but the Full Bench ruling has not been closely examined and with due respect to the learned Judges who decided that case or who followed it, I am of opinion that even if the actual decision in that case might have been correct, the reasoning given in that judgment is not supported either on principle or by the language employed in Ss. 64 and 73 of the Code of Civil Procedure or even by the decision of their Lordships of the Judicial Committee in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[2].

1. (1917) 33 M.L.J. 707: I.L.R. 41 Mad. 265 (F.B.).
2. (1916) 32 M.L.J. 425: L.R. 44 I.A. 72: I.L.R. 44 Cal. 662 (P.C.).

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My answer to the reference must for the above reasons be in the affirmative. I agree that the costs of this reference be made costs in the appeal.

Krishnaswami Aiyangar, J.—It is not without regret, that I feel myself obliged to express my dissent from the view accepted by a majority of my learned brothers on this reference. That view which is essentially different from mine has indeed made it necessary that I should go over the ground once again, and test the soundness of every link in the chain, every step in the reasoning by which I was persuaded to accept the opinion expressed in the order of reference. Having done that, and having given my careful and anxious attention to all that has been urged at the bar since, I regret to say that I still remain of the same opinion. In the order of reference, I have endeavoured to explain at some length the considerations which influenced me in forming my opinion. A briefer and a more pointed statement is all that is now necessary and may perhaps be more to the purpose to explain the reason why I have felt obliged to differ from my learned brethren.

That the Legislature had an object in adding the Explanation in S. 64 is undeniable. Whether that object was to introduce a change, or remove a doubt, it is bootless to enquire. Whichever it was, it is manifest that it concerned claims to rateable distribution, a subject on which the Code of 1908 has made at least one important change. Under the old Code, such claims were linked up with execution, and were recognised only when made in respect of assets *realized in execution.* That link has been removed under the new Code, and the right is no longer dependent on the mode by which the assets reach the hands of the Court. In whichever way now, the assets are received, whether by execution or otherwise, it makes no difference. Look at the consequence, which necessarily follows from this change. Rateable distribution is entirely dissociated from attachment in execution. True, the claim to rateable distribution may arise, as it often does, even now, in respect of assets realized in execution. But the necessity which had existed for the assets being realized by the process of execution has definitely ceased under the new Code. The claim may now arise in respect of assets brought into Court in either of two ways: (*i*) by attachment in execution, or (*ii*) by other means without any connection with execution. The right to rateable distribution, in

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S. 64, must comprehend both varieties, and there can be no warrant for limiting it to only one of the two.

I have said that the purpose behind the explanation to S. 64 was either to effect a change, or remove a doubt, in respect of claims to rateable distribution. The plain object of the section was to prevent the successful perpetration of fraud by the debtor against the just claims of a diligent creditor even after adjudication by Court. The law favours equal distribution of a debtor's assets among his creditors provided they exhibit some degree of diligence and sets its face against an unnecessary multiplicity of proceedings so far as it can be avoided. When the creditor properly moves the Court, it helps him by attaching the debtor's property, that is, it takes the property into its own custody. Thereafter the attaching creditors' rights are safe and cannot be defeated by any subsequent dealing by the debtor with the property attached. In this respect, the present S. 64 does not differ from the old S. 276, the object of both being to throw a protection round the creditor who had attached. Under the old section however the protection was a more limited one *and* was confined to claims truly enforceable under the attachment which must also be one placed on the property at his instance, and not at the instance of any other creditor. In the referring order I have attempted an explanation of the expression, "claims enforceable under an attachment." It is now enough to say that only such claims fulfil the description as are necessarily traceable to and integrally connected with the attachment relied on for avoiding the alienation. A prior attachment, and enforceability under it were thus the two essentials on which the old Code insisted before it extended its protection. If these conditions were satisfied, S. 276 of the old Code stepped in and annexed to such claims, a power and potency, of sufficient strength to avoid a subsequent private alienation. So far the position remains unchanged even under the new Code.

To explain the matter still further, a bare claim for rateable distribution arising out of an application for execution which had not got to the stage of an attachment was under the old Code ineffectual against a private alienation. Until an attachment was made by the claimant, he could not prevent the debtor from dealing with his property to his (the claimant's) prejudice. That there was a subsisting attachment at the date

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of the alienation, at the instance of another creditor, was a circumstance from which the claimant could derive no benefit, as his claim was not one which could properly be regarded as enforceable under that attachment. Not possessing this quality, his claim could not affect the alienation, in spite of its taking its origin in an execution application of a prior date.

An application for execution was and is all that is necessary to entitle a decree-holder to rateable distribution, (*Somasundaram Chettiar* v. *Alamelu Achi*[1] and *Abdul Salam* v. *Veerabhadra*[2],) provided the application is made in time. But under the old Code the capacity to avoid a later alienation, was the peculiar attribute only of a prior attachment, and not that of a bare application for execution, which though prior in date, did not carry with it, anything more than what may be called a limited and contingent right. If the prior attachment progressed to a sale, the alienation was destroyed. But the destruction was wrought not by the naked claim for rateable distribution founded on a mere execution application but by a prior attachment taking effect according to the positive provisions of S. 276. It is the sale alone following the attachment that produced this result. In the resulting proceeds, the claimant who had put in his application in time had no doubt the right to share given to him by S. 295. But until the sale actually took place, he had to wait in patience and had but a mere contingency in his favour. For it was the right solely of the prior attaching decree-holder to proceed further with the execution or abandon the attachment. If he was minded to do the latter, nobody could prevent it, though that step would put an end to the expectations of the bare claimant for rateable distribution. The latter could not help such a culmination coming to pass, as he had no sort of control over the attaching decree-holder who had the right at his will to determine what he would do, regardless of the consequence of his action or inaction on the expectations of other decree-holders. This, I consider, was the state of the law under the old Code and was recognised by the Privy Council as such in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[3]. Their Lordships emphasised the position first by saying that the prior attachment was alone the weapon of attack, and secondly by indicating the necessity for the contin-

1. (1937) M.W.N 480 (486).
2. (1929) 57 M.L.J. 97: I L.R. 52 Mad. 760 (F.B.).
3. (1916) 32 M.L.J. 425: L.R. 44 I.A. 72: I.L.R. 44 Cal. 662 (P. C.).

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gency being converted into an actuality by the assets being actually realised by the sale.

The position then under the old Code, of a decree-holder who had not attached, but who had merely qualified himself for rateable distribution by an execution application was thus attended with risk. He had a chance, but not a certainty of getting even a partial satisfaction, and his doubtful position seems to have evoked the ineffective sympathy of the Calcutta High Court in *Durga Churn Rai Chowdhury* v. *Manmohini Dasi*[1], whereas Telang, J., in *Sorabji Edulji Warden* v. *Govind Ramji*[2], managed by, if I may say so without meaning the slightest offence, a fallacious reasoning to give him a protection where the other Courts with stricter adherence to the language of the old Code found themselves powerless to give. He argued, wrongly as I think, that there was such a necessary connection between the attachment of one decree-holder and the bare claim for rateable distribution of another, that the claim of that other could be regarded as a claim enforceable under the attachment. The connection could not however be maintained unless the attachment fructified in a sale and led to the actual receipt of assets by the Court. It is this handicap that has been sought to be removed by the explanation added to S. 64 under the Code of 1908.

The explanation has it seems to me extended the protection of the section to bare claims for rateable distribution also, by the inclusive definition newly introduced by it. I read the words "for the purpose of the section" as meaning for the purposes of avoiding a private alienation which is the obvious object of the section. Indeed, I cannot think of any other. Claims for rateable distribution whether or not they are in fact or in law claims really enforceable under an attachment are by force of the new definition notionally to be regarded as such for the pnrpose of avoiding a private transfer. This remarkable improvement in the status of these claims has been effected by including such claims by statutory definition within the expression "claims enforceable under an attachment." The claim for rateable distribution simpliciter without the support of an anterior attachment are now as powerful and potent as claims enforceable under an attachment. The qualifications considered essential by all other Courts except Bombay, namely, a prior

1. (1888) I.L.R. 15 Cal. 771.
2. (1891) I.L.R. 16 Bom. 91.

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attachment was dropped as I think deliberately, in view of what had been said in *Durga Churn Rai Chowdhury* v. *Manmohini Dasi*[1]. That a change was intended is perfectly plain to my mind, from a further circumstance. The word 'include' used in the explanation, has the legal significance attached to it by Lord Esher, M. R., in *Rodger* v. *Harrison*[2]:

"The word 'interpreted' (in the present case claims enforceable under an attachment) "has its ordinary meaning. That meaning it still has in the Act. But then there are other meanings that the Legislature wishes it to have in the Act. So the definition is used to enlarge the meaning of the term beyond its ordinary meaning and make it include matters which the ordinary meaning would not include. But this enlargement of meaning is confined to the matters expressly mentioned in such definition."

In the light of this explanation of the word 'include' there is sufficient warrant for holding that the scope of S. 64 has been enlarged. In what other direction, I respectfully ask, is effect to be given to this, to me plain, enlargement unless it be in regard to the rights of claimants for rateable distribution? And how else is that to be, except by removing the handicap, the necessity for a prior attachment? To my mind, it is clear that the substratum of a prior attachment is no longer to be considered necessary to turn a bare claim for rateable distribution into a weapon of attack. The pendency of an earlier attachment is still a requisite but it is enough if it had been placed by some other creditor and was still subsisting when the claim was made. That necessary integral connection which was under the old Code such a supreme and essential pre-requisite is no longer required under the new Code. As I read the explanation, its effect seems to be that claims truly enforceable under the attachment equally with claims for rateable distribution devoid of that characteristic, are placed on an equal footing and both have under the new Code the power of overriding a subsequent private alienation, provided of course the claimant for rateable distribution has made his application in time and while the attachment is yet pending.

I have given my best consideration to the decision of the Privy Council in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*[3], but regret to find myself unable to agree that it is or was intended to be an authoritative ruling on the construction of S. 64 with the Explanation newly added to it, more especially in

1. (1888) I.L.R. 15 Cal. 771. 2. (1893) 1 Q.B.D. 161 at 167.
3. (1916) 32 M.L.J. 425: L.R. 44 I.A. 72: I.L.R. 44 Cal. 662 (P.C.)

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view of what their Lordships have thought fit to observe in *Nur Mohammed Peerbhoy* v. *Dinshaw Hormasji Motiwalla*[1]. I am also quite alive, I may add, to the volume and weight of judicial opinion which has accumulated in this country ever since the Full Bench decision of the court in *Annamalai Chettiar* v. *Palamalai Pillai*[2] But sitting now as a member of a Fuller Bench, I have felt myself at liberty to examine the foundations on which that opinion rests. It is enough to say that I have most carefully considered that case and every other case, cited at the bar, or referred to in the judgment just now delivered, but I still remain unconvinced.

My answer to the question referred is accordingly in the affirmative. I agree that the costs of this reference should be costs in the cause.

This second appeal coming on for final hearing after the expression of the opinion of the Full Bench,

The Court delivered the following

JUDGMENT.—In view of the answer of the Full Bench this second appeal must be dismissed with costs.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR SIDNEY BURN, *Officiating Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Jones, *In re.*

A. V. Jones and another .. *Appellants** (*Petitioners*).

Presidency Towns Insolvency Act (III of 1909), S. 106 (1) (a)—Order for administration of an insolvent estate in a summary manner—Failure to obtain leave of Court to appeal—Appeal if can be entertained.

Under S. 106 (1) (*a*) of the Presidency Towns Insolvency Act it is quite clear that where an insolvent's estate has been ordered to be administered in a summary manner, no appeal lies from any order of the Court except by leave of Court, and so where no leave is obtained the appeal cannot be entertained.

Appeal sought to be preferred against the order of the Hon'ble Mr. Justice Somayya dated 25th September, 1939 and made in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 194 of 1939 in Petition No. 230 of 1936.

T. P. Ramachandra Aiyar for Appellants.

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1. (1922) 45 M L.J. 770 (P.C.).
2. (1917) 33 M L.J. 707: I.L.R. 41 Mad. 265 (F B.).

*S. R. No. 27956 of 1939. 24th January, 1940.

Jones, In re.

Burn, Offg. C.J.

The judgment of the Court was delivered by

The Officiating Chief Justice.—Under S. 106 (1) (*a*) of the Presidency Towns Insolvency Act it is quite clear that where an insolvent's estate has been ordered to be administered in a summary manner, no appeal lies from any order of the Court except by leave of the Court. The proviso to S. 106 (1) is concerned solely with the provisions of the Act relating to the discharge of the insolvent and has no bearing on the question of appealability of orders passed. In this case no leave has been obtained. This appeal therefore cannot be entertained and it is rejected.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Ramaswami Reddi .. *Petitioner* (Petitioner-1st Defendant)*

v.

Alagayammal .. *Respondent (Respondent-Plaintiff).*

Ramaswami Reddi *v.* Alagayammal.

Madras Agriculturists' Relief Act (IV of 1938), S. 4 (h)—Construction—Half share in another mortgage—Whether "other property" or "debt".

Besides the decree debt, sought to be scaled down a woman creditor was entitled to a half share in a mortgage debt. The principal amount of these two debts which were due on the 1st October, 1937, did not exceed Rs. 3 000. But the debtor contended that she was not entitled to the exemption under S. 4 (*h*) as the share in the mortgage debt was "other property".

Held, if it is found that the other debt due to the woman creditor is also a debt due from an agriculturist she will be entitled to the benefit of the exemption under S. 4 (*h*). If not, such debt must be regarded as "other property" within the meaning of the provision and she will be excluded from it.

Anomalies which the wording of the section lead to pointed out

Decision of Krishnaswami Aiyangar, J., in C. R. P. No. 1072 of 1938 (unreported) overruled.

Petition under S. 115 of Act V of 1908 and S. 224, Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of Sankaridrug at Salem dated 28th January, 1939 and made in I. A. No. 990 of 1938 in O. S. No. 1115 of 1935.

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* C. R. P. No. 1112 of 1939. 30th January, 1940.

Ramaswami Reddi *v.* Alagayammal.

Patanjali Sastri, J.

K. Narasimha Aiyangar and *D. Ramaswami Aiyangar* for Petitioner.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Respondent.

The judgment of the Court was delivered by

Patanjali Sastri, J.—The question for determination in this Revision Petition relates to the construction of S. 4 (*h*) of the Madras Agriculturists' Relief Act, 1938. The petitioner claiming to be an "agriculturist" applied under the provisions of the Act for the scaling down of the debt due by him under a decree obtained by the respondent. It was not denied that the petitioner was an agriculturist within the meaning of the Act, but the respondent being a woman claimed the benefit of the exemption under S. 4 (*h*) of the Act and the question is whether, on a proper construction of that provision, her claim is sustainable.

It is not in dispute that, besides the decree-debt now sought to be scaled down, the respondent is entitled to a half share in a mortgage debt due from another person but has no other property, and that the principal amount of these debts both of which were due on the 1st October, 1937, did not exceed Rs. 3,000. On these facts it is argued for the petitioner that the respondent is not entitled to the exemption claimed, as she owned on the material date "other property", that is, her half share in the mortgage debt referred to above, besides the debt sought to be scaled down; while the respondent contends that the words "other property" must be taken to refer to property other than the debt or debts sought to be scaled down but not any debt or debts due to the woman from agriculturists [*see* the definition in S. 3 (*iii*)]. The provision is not happily worded and is not free from ambiguity, but on the whole we are of opinion that the contention of the respondent is correct. There is nothing to indicate that the words "any debt or debts" in cl. (*h*) refer to the debt or debts in respect of which the application for scaling down has been made. On the other hand the opening words of the section "Nothing in this Act shall affect debts and liabilities of an agriculturist falling under the following heads" show that the exemption relates to certain classes of debts and has no particular reference to the debt sought to be scaled down. The exemption under S. 4 (*h*), as we understand the provision, covers a particular category of

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debts, limited in regard to their nature and extent, while insisting as a condition of its application that the creditor woman should not have owned on the date specified any other property that is to say, property not falling under that category apart from property excluded by the explanation. In other words debts due from agriculturists to a woman on the 1st October, 1937, are not to be scaled down under the Act if on that date the principal amount of such debts did not exceed Rs. 3,0)0 and the woman did not own any property other than such debts apart from her personal belongings.

Learned Counsel for the petitioner objects that on the above construction, the inquiry on an application under the Act would have to relate not only to the character of the applicant as an agriculturist but also to the similar character of the various debtors from whom debts might be due to the creditor woman and such a 'roving' inquiry extending beyond the subject-matter of the proceeding could not have been contemplated by the Legisl iture. The objection is not without force, but, on the other hand, it is to be observed that if the provision were to be construed in the manner suggested for the petitioner, the exemption under it would become practically illusory. For example, if a woman having no other property had two claims, each for a small sum, say, Rs. 100 and an application was made to scale down one of the debts the existence of the other debt would exclude her from the benefit of the exemption; while if she had only one claim for just under Rs. 3,000, the exemption would apply. A construction which leads to such startling and anomalous results cannot be accepted unless the language used by the Legislature is so clear and unambiguous as to compel its acceptance. It is no doubt true that even on the construction indicated by us above, there would be the anomaly that while a woman owning jewellery or other personal belongings worth a large sum could claim the benefit of the exemption for a debt of, say, Rs. 2,500 due to her, a woman having a claim for a smaller sum but owning one or two cents of land yielding may be next to nothing would be excluded from such benefit. This result is no doubt regrettable and was perhaps not intended, but it is unavoidable on the present wording of the provision. That, however, is no reason for adopting the petitioner's construction which would render the exemption more illusory and the anomalies involved in its application more glaring, especially

when there is nothing in the language employed to support such construction. Learned Counsel for the petitioner relied on the decision of Krishnaswami Aiyangar, J., in C. R. P. No. 1072 of 1938 (not yet reported), where the learned Judge appears to have construed S. 4 (*h*) in the manner suggested for the petitioner. The question does not appear to have been fully considered and the learned Judge gives no reasons in support of his conclusion and, with due respect, we are unable to agree with it.

As it has not been ascertained whether the mortgage debt due to the respondent and another is a debt due from an agriculturist, the case will have to go back for an inquiry on that matter. If it is found that the debt is also a debt due from an agriculturist, the respondent will be entitled to the benefit of the exemption; if not, such debt must be regarded as "other property" within the meaning of the provision and the respondent will be excluded from it. Costs throughout will abide and following the result.

K. S. *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

K.S.R.M. Sivasubramaniam Chettiar .. *Appellant** (*Petitioner*)

v.

Murugesa Mudaliar and another .. *Respondents* (*Respondents*).

Civil Procedure Code (V of 1908), O. 21, rr. 71, 84 and 85—Execution application—Sale—Purchaser's deposit of 25 per cent. of sale price in Court—Balance not paid within time—Dismissal of application and deposit refunded—Fresh application by decree-holder—Sale in a later application—Deficit in price—Application by decree-holder against original purchaser for recovering deficit—Whether application same—Nature of application—Limitation Act (IX of 1908), Art. 181.

In an execution proceeding, the property of the judgment-debtor was sold by the Court on the 23rd February, 1932, the first respondent being the purchaser. The deposit of 25 per cent. of the amount as required by the rules was made in the Court. But as a result of delay in the payment of the balance the Court held that there had been no sale in law and directed later for the refund of the deposit. Some time later as the result of a further application by the decree-holder the property was advertised for sale; but the application

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*L. P. A. No. 102 of 1938. 30th November, 1939.

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was dismissed for want of bidders. Again another application was filed and the property was sold to another purchaser for a smaller amount leaving a deficit, and so the decree-holder applied for an order against the original purchaser under O. 21, r. 71, which states that any deficiency of price which may happen on a re-sale by reason of purchaser's default is recoverable with costs. The application was dismissed by the Court on the grounds that (1) there was material irregularity in the publication of the sale; (2) that the property sold was not the same as previously sold; and (3) that even if it were same, there was undue delay in the filing of the application leading to the second sale.

Held, (1) that in the absence of a provision in the Civil Procedure Code stating when the application for a re-sale should be made, the decree-holder was entitled to make the application at any time within three years, as Art. 181 of the Limitation Act applied;

(2) that even if it were that the matter was not governed by Art. 181 of the Limitation Act, it was incumbent upon the decree-holder to apply for re-sale within a reasonable time and that condition having been fulfilled in the present case, there was no bar to such an application.

(3) that it having been held in *Sasivarna Tevar* v. *Arulanandam Pillai*, (1897) 8 M.L.J. 18: I.L.R. 21 Mad. 261; *Suppa Reddiar* v. *Avudai Ammal*, (1904) 14 M.L.J. 401: I.L R. 28 Mad. 50 (F.B.); *Chalavadi Kotiah* v. *Paloori Alamelammal*, (1907) 18 M.L.J. 46: I.L.R. 31 Mad. 71; *Sundaramma* v. *Abdul Khadar*, (1932) 64 M.L.J. 664: I.L.R. 56 Mad. 490 (F.B.) and *Abdul Azim Sahib* v. *Chokkan Chettiar*, (1935) 69 M.L.J. 821: I.L.R. 58 Mad. 893 at 901 (F.B.) that an application in execution, which was necessitated by the action of the Court itself in striking off a previous application, was not a fresh application but should be deemed an application to revive or continue the former application, the application which the decree-holder was compelled to file here was not a fresh one but was an application to revive or continue the application which led to the sale;

(4) that the decree-holder was entitled to recover the deficit from the defaulting purchaser.

Appeal under cl. 15 of the Letters Patent against the judgment and order of the Hon'ble Mr. Justice Abdur Rahman dated 14th November, 1938 and passed in C.M.S.A. No. 53 of 1936 preferred to the High Court against the order of the Court of the Subordinate Judge of Coimbatore dated 25th September, 1935 and made in Civil Appeal No. 50 of 1935 (E.A. No. 1814 of 1933 in E.P.R. No. 2567 of 1931 in O. S. No. 197 of 1931, District Munsif's Court, Tirupur).

T. S. Anantaraman for Appellant.

K. Rajah Aiyar and *V. Sankaran* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant obtained a money decree against the second respondent in the Court of the District Munsif of Tirupur and in execution of that decree attached immovable property belonging to the judgment-debtor. The

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property was sold by the Court in execution proceedings on the 23rd February, 1932, the first respondent being the purchaser. The first respondent immediately deposited 25 per cent. of the purchase price, which was Rs. 715, as required by r. 84 of O. 21 of the Code of Civil Procedure. The sale proclamation disclosed that there was a mortgage on the property, but it indicated that the mortgage was invalid. The mortgage was in fact a valid one and subsequently the mortgagee obtained a mortgage decree. The first respondent did not pay the balance of the purchase money within fifteen days, as required by r. 85 of O. 21, but on the 29th February he applied for an order setting the sale aside on the ground of material irregularity in the publication of the sale inasmuch as the mortgage had been described as being invalid. As the balance of the purchase money had not been paid into Court the District Munsif held that there had in law been no sale and therefore there was no need for an order setting aside the sale. On this ground he dismissed the first respondent's application and by a subsequent order directed that his deposit of 25 per cent. of Rs. 715, namely, Rs. 178-12-0 should be refunded to him. On the 30th March, 1932, the District Munsif, for what has been described as "statistical reasons", struck off his list of pending cases the application of the appellant for the sale of the second respondent's property. The Court closed for the summer vacation on the 11th May, 1932, until the 28th June, 1932. On the reopening day the appellant filed a fresh application for the sale of the same property. He was compelled to do so in consequence of the District Munsif's action on the 30th March, 1932, which action was illegal. As the result of the fresh application the property was advertised for sale by the Court on the 24th September, 1932. There were no bidders at the auction and the District Munsif dismissed the application. This again constituted unlawful action on his part. The fact that there were no bidders on this occasion did not prevent the appellant from asking the Court in the same proceedings to put up the property for sale at a later date. The 25th September, 1932, was a Saturday and the Court was closed. When it reopened on Monday, the 27th September, the appellant filed a further application for the sale of the property and on this application the Court directed the auction to take place on the 3rd January, 1933. At this auction the property was sold to one Somasundara Naidu for Rs. 301, leaving a deficit of Rs. 414,

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On the 25th November, 1933, the appellant applied for an order against the first respondent for the payment of this sum under the provisions of O. 21, r. 71, which states that any deficiency of price which may happen on a re-sale, by reason of the purchaser's default, and all expenses attending such re-sale, shall at the instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulting purchaser.

The District Munsif dismissed the application on three grounds, namely:—(1) There had been material irregularity in the publication of the sale of 23rd February, 1932; (2) the property which was sold to Somasundara was not in law the same property as was sold to the first respondent, a mortgage decree having been passed in the meantime; and (3) even if the property was the same there had been undue delay in filing the application which had led to the second sale, namely, the application of the 27th September, 1932. The appellant appealed to the Court of the Subordinate Judge of Coimbatore. The Subordinate Judge allowed the appeal. He found that the appellant had not been guilty of culpable delay and that the property which was sold to Somasundara was the same property which was sold to the first respondent. He also held that there was no material irregularity in the conduct of the first sale, but in any event it had caused no injury to the auction-purchaser. The first respondent then appealed to this Court and his appeal was heard by Abdur Rahman, J., who allowed it on the ground that the appellant was not entitled to recover because there had been a delay of about eleven months in filing the application which had resulted in the sale to Somasundara. The learned Judge recognised that the delay was not due to any fault of the appellant, but nevertheless he considered that the appellant was not entitled to payment of the balance because delay had taken place. He agreed with the Subordinate Judge that there had been no irregularity in the publication of the first sale and that the first respondent had suffered no injury. He also agreed that the property sold on the second occasion was identical with the property which was sold on the first occasion.

Only three questions have been argued before us. They are these:—(1) Whether the learned Judge was right in holding that there had been delay and that as the result of that delay the appellant has lost his remedy; (2) whether in order to recover from the first respondent the deficit the second sale must

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have taken place under the same application; and (3) whether the property sold on the second occasion is identical with the property sold on the first occasion.

It is manifest that the appellant had been diligent throughout and there is no ground for holding that there had been delay in the filing of the application of the 27th September, 1932. The delay which took place in the second sale was due entirely to the improper action of the District Munsif in closing for "statistical reasons" the first application for sale and his improper action in dismissing the second application when there were no bids made at the auction which was fixed for the 24th September, 1932. But even if there had been a delay of eleven months this would not justify the Court in rejecting the appellant's application for an order directing the payment of the amount of the deficit. The learned Judge has in effect read into the Civil Procedure Code, something which is not there and something which should not be there. When there has to be a re-sale as the result of the default of the auction-purchaser the decree-holder has to apply for a re-sale. O. 21, r. 87 as framed by this Court, says that every re-sale of immovable property in default of payment of the amount mentioned in r. 85 (the full amount of the purchase money plus the amount required for the general stamp for a certificate under r. 94) shall be made after the issue of a fresh proclamation. The Code of Civil Procedure contains no provision stating when the application for a re-sale shall be made, and therefore the decree-holder is entitled to make the application at any time within three years as Art. 181 of the Limitation Act applies. It may be thought that this period is too long in such a case, but the Court is not concerned with that. Its duty is merely to apply the law.

The learned Judge relied on the observations of Kumaraswami Sastri, J., in *Venkatachalamayya* v. *Nilakanta Girjee*[1], where he said that:

"The reasonable construction to place on r. 71 is that the re-sale should be within a reasonable time after the first sale."

Abdur Rahman, J., rightly observed this statement can only be regarded as *obiter*, but he considered that the principles governing the assessment of damages in cases of breach of contract apply here, and that the defaulting auction purchaser

1. (1917) 34 M.L.J. 156: I.L.R. 41 Mad. 474 at 485 (F.B.).

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should not suffer for any fall in prices which may take place after his default. I am unable to agree. O. 21, r. 71 says that the defaulting purchaser shall be responsible for the deficit and there is no qualification of this statement. But even if it were the case that an application for a re-sale is not governed by Art. 181 of the Limitation Act and that it is incumbent upon the decree-holder to apply for a re-sale within a reasonable time that condition has been fulfilled in the present case. The appellant took prompt steps for the securing of an order for re-sale and, as I have pointed out, the re-sale did not take place as early as it should have done because of the erroneous orders passed by the District Munsif, not passed in a judicial capacity but in pursuance of an administrative practice which I trust has long been discontinued.

Mr. Rajah Aiyar on behalf of the first respondent has contended that the re-sale took place in execution proceedings different from those originally instituted, but this argument does not call for discussion. It has been decided over and over again that an application in execution which is necessitated by the action of the Court in striking off a previous application for execution is not in law a fresh application, but must be taken to be an application to revive or continue the former application. I need only mention *Sasivarna Tevar* v. *Arulanandam Pillai*[1], *Suppa Reddiar* v. *Avudai Ammal*[2], *Chalavadi Kotiah* v. *Paloori Alamelammal*[3], *Sundaramma* v. *Abdul Khadar*[4] and *Abdul Azim Sahib* v. *Chokkan Chettiar*[5]. The application which the appellant was compelled to file on the 28th June, 1932, by reason of the order of the 30th March, 1932, and the application of the 27th September, 1932, which was necessitated by the order of the 24th September, 1932, are not fresh applications, but are applications to revive or continue the application which led to the sale of the 23rd February, 1932, and therefore it must be held that the sale to Somasundara was a sale in the original proceedings.

There is also no substance in the third contention raised on behalf of the first respondent. The property sold to Soma-

1. (1897) 8 M.L.J. 18 : I.L.R. 21 Mad. 261.
2. (1904) 14 M.L.J. 401 : I.L.R. 28 Mad. 50 (F.B.).
3. (1907) 18 M.L.J. 46 : I.L.R. 31 Mad. 71.
4. (1932) 64 M.L.J. 664 : I.L.R. 56 Mad. 490 at 503 (F.B.).
5. (1935) 69 M.L.J. 821 : I.L.R. 58 Mad. 893 at 901 (F.B.).

sundara was in truth and in fact the same property which was sold to the first respondent. In the first case the property was bought subject to a mortgage; in the second case, the property was the same but the mortgage had been replaced by a mortgage decree. The property was the same property and what was sold was the right, title and interest of the judgment-debtor in it.

For the reasons indicated the appeal succeeds and the appellant is entitled to his costs throughout.

K. C. —— *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MOCKETT AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

S. Km. Sp. Meyyappa Chettiar, Karaikudi .. *Respondent.*

Indian Income-tax Act (XI of 1922), S. 4 (2)—Profits accrued outside British India—Loan raised by assessee there—Loan transmitted to British India—Loan repaid outside British India from profits of the business there—Amount of loan transmitted, if remittance of profits to British India and assessable.

The assessee was a partner with two others in a money-lending business carried on at *T* and *K* in F.M.S. outside British India. The *T* firm was started on 12th December, 1936. Before that date the *K* firm had made considerable profits. The partners borrowed from another firm at *T* a sum of Rs. 27,500 and of that the assessee received for his share Rs. 7,500, which the assessee's agent at *T* remitted to Karaikudi in British India. To repay the loan, the partners transferred profits from *K* business to the *T* branch and out of the remittance of profits, they discharged the loan.

Held, that the remittance of Rs. 7,500 was a remittance of profits within the meaning of S. 4 (2) of the Income-tax Act (XI of 1922) and was assessable.

Subramaniam Chettiar v. *Commissioner of Income-tax, Madras*, (1935) 69 M.L.J. 844: I.L.R. 59 Mad. 171 (F.B.), relied on.

Case stated by the Commissioner of Income-tax, Madras, was as follows:—

I have the honour to refer the following case for the decision of the Hon'ble the Judges of the High Court under S. 66 (2) of

* O. P. No. 290 of 1938. 23rd October, 1939.

F.B.

Commissioner of Income-tax, Madras
v
Meyyappa Chettiar.

the Indian Income-tax Act, XI of 1922 (hereinafter referred to as the Act).

2. The petitioner who is an assessee within the jurisdiction of the Income-tax Officer, Karaikudi I circle, derives income mainly from money-lending business. He has a business of his own at Karaikudi, which is his headquarters, and has also a share in certain other money-lending business carried on in partnership with others in places outside British India such as Kambar, Teluk Anson and Sithiawan. In the present reference we are concerned only with the firms at Kambar and Teluk Anson both of which are in the Federated Malay States.

3. For the assessment year 1937-38 (previous year—Tamil year Dhathu ended 12th April, 1937) the petitioner returned a total income of Rs. 8,133 which included a sum of Rs. 7,500 being the amount received by him in British India from the S.K.M. firm, Teluk Anson, in which he was a partner. In the course of the examination of the accounts, however, he contended that the remittance was not from profits as no profits were available at Teluk Anson on the date of the remittance.

4. The petitioner is a partner along with two others in two firms run under the vilasam of S. K. M. one at Kambar and the other at Teluk Anson. The firm at Kambar has been in existence for some years, while that at Teluk Anson was started on 28th October, 1936, that is, in the year of account. On 14th December, 1936, this firm borrowed Rs. 27,500 ($17,727-76) from the O.R.M. O.M. firm, Penang and remitted it to the petitioner and the other two partners, the petitioner and one of the partners getting Rs. 7,500 each, and the remaining partner Rs. 12,500. From 11th January, 1937, various amounts were received at Teluk Anson from the Kambar firm, and at the end of the year of account the credit balance in favour of Kambar in the Teluk Anson books stood at $19,384-11. These funds enabled the Teluk Anson firm to repay the amount borrowed from the O.R.M.O.M. firm, within a few months from the date on which it was borrowed.

5. The Income-tax Officer found, according to the profit and loss statement filed by the petitioner's agent, that there was a profit of $14,270-66 at Teluk Anson during the period 28th October, 1936 to 12th April, 1937. He also assumed, and the petitioner did not dispute the assumption, that the sum of $19,384-11 received from Kambar included the profits of the firm at that place. There were thus, in the Income-tax Officer's opinion, profits to the extent of $33,654 available at Teluk Anson, of which the petitioner was entitled to a 1/3rd share or $11,218 (over Rs. 17,000). As this was very much in excess of the amount remitted to the petitioner

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to British India, the Income-tax Officer held that the remittance must be regarded as having been made out of profits. A copy of his assessment order is appended marked Exhibit A.

6. The petitioner appealed to the Assistant Commissioner and contended that the remittance could not be said to have come out of profits for the following reasons:—

(1) The remittance was made out of the borrowed money.

(2) There was no profit at Teluk Anson on the date of remittance.

(3) The Kambar funds became available at Teluk Anson only after the date of remittance.

(4) The repayment of the debt to O.RM.O.M. Penang out of these funds constituted the discharge of a foreign liability.

The Assistant Commissioner conceded that the Teluk Anson firm as such had no profits to remit, but considered that since Kambar profits had been received at Teluk Anson and such profits had been used for repaying the loan out of which the remittance of Rs. 7,500 had been made, the amount remitted from Teluk Anson really represented Kambar profits. He accordingly confirmed the assessment. A copy of his order is filed as Ex. B.

7. The petitioner now requires me to revise his assessment by eliminating the sum of Rs. 7,500 or, in the alternative, to refer to the High Court the questions set out in his application a copy of which is filed as Ex. C. As I do not see my way to grant him any relief by revising the assessment, I refer for the decision of their Lordships the following question, which, in my opinion, is the only question of law that arises on the facts of this case:—

"Whether under a proper construction of S. 4 (2) of the Act the sum of Rs. 7,500 was rightly included in the petitioner's assessment as a remittance of profits."

8. The normal presumption in cases of this nature is the remittance was made out of profits and it is for the petitioner to rebut this. I consider that he has entirely failed to do so. He does not deny that profits were available at Kambar, that certain amounts were received at Teluk Anson out of those profits and that these amounts were utilised for repaying the loan out of which the remittance to the petitioner was originally made. The amount which the Teluk Anson firm remitted to the petitioner on 14th December, 1936, was recouped by it on a later date (within the year) from his share of profits of the Kambar firm. His share of the Kambar profits has consequently been reduced and will not to that extent be available for him at that place. It is no doubt true that when the sum of Rs. 7,500 was remitted to British India from Teluk Anson, the profits from Kambar had not actually been

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received at Teluk Anson. But in these matters the form of the transaction is of little importance and it is its substance that we have to look at. What clearly happened in this case is that the petitioner brought Rs. 7,500 of his Kambar profits to British India *via* Teluk Anson. The question should, I consider, be answered in the affirmative.

Reference under S. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras.

K. V. Sesha Aiyangar for Petitioner.

M. Subbaroya Aiyar for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The assessee is a Nattukottai Chettiar whose headquarters are in Karaikudi. He is a partner with two other Chettiars in a money-lending business carried in Teluk Anson and at Kambar in the Federated Malay States. The Kambar business had resulted in considerable profits before the Teluk Anson business was started on the 12th December, 1936. On the 14th December, 1936, the partners borrowed from another Chettiar firm doing business in Teluk Anson the sum of Rs. 27,500. This money was divided between the partners and the assessee received as his share, Rs. 7,500, which his agent in Teluk Anson then remitted to Karaikudi. To pay off the lender, the assessee and his partners transferred profits from the Kambar branch to the Teluk branch, and out of the remittance of profits, they fully discharged the loan. In the circumstances the Income-tax authorities have treated this remittance of Rs. 7,500 by the assessee as a remittance of profits in respect of the year of assessment, 1937-38. The assessee contended that the order of the Income-tax authorities was wrong and asked the Commissioner of Income-tax to refer for the decision of this Court the following question:

"Whether under a proper construction of S. 4 (2) of the Act, the sum of Rs. 7,500 was rightly included in the petitioner's assessment as a remittance of profits."

The Commissioner of Income-tax complied with the assessee's request for a reference, and the Court is now called upon to give the answer.

The answer must be in the affirmative. If it were otherwise, it would mean that a person who had made profits abroad could evade the provisions of S. 4 (2) of the Income-tax Act by simply borrowing and repaying the loan out of the profits immediately he had remitted the proceeds of the loan to India.

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In such circumstances the remittance to India can only be regarded as a remittance of profits. The profits having been used in paying for the remittance, the remittance must necessarily represent the profits. On the facts of this case, there can be no doubt that the Rs. 7,500 did represent a remittance of profits.

The learned Advocate for the assessee has contended that this case is governed by the decisions in *Hall (H. M. Inspector of Taxes)* v. *Marans*[1] and *Multan Chand Johurmull* v. *Commissioner of Income-tax, Bengal*[2]. The former case was considered by a Bench of this Court in *Subramaniam Chettiar* v. *Commissioner of Income-tax, Madras*[3], where it was pointed out that it had no application in a situation like the present one. In *Multan Chand Johurmull* v. *Commissioner of Income-tax, Bengal*[2], the Calcutta High Court was dealing with a case where the assessee had a branch in Calcutta and one in Cooch Behar. It was not a question of bringing profits from Cooch Behar to Calcutta. The facts were altogether different.

The answer to the reference, as I have indicated, will be in the affirmative, and the assessee having lost, must pay the usual costs, Rs. 250.

S.V.V. *Question answered in the affirmative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Bava C. Gopalaswami Mudaliar .. *Appellant** (*Plaintiff*)

v.

The Annadhana Kattalai of Sri Tyagarajaswami temple, Tiruvarur by Trustee, Vaithilinga Pandarasannadhi and another .. *Respondents* (*Defendants*).

Gopalaswami Mudaliar *v.* Vaithilinga Pandarasannadhi.

Trust—Scheme prohibiting borrowing from or lending to trust fund—Person lending contrary to the provision—Rights.

A clause in a scheme prohibited borrowing from or lending to the trust fund on interest and plaintiff under power-of-attorney from trustees managed the trust and incurred expenses for provisions and necessaries. In a claim for the amount,

Held, the plaintiff cannot be heard to say that he was enabling the trustee to perform his duty to the trust and therefore entitled to be compensated for what he has supplied.

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1. (1933) 18 Tax Cases 148. 2. (1931) 5 I.T.C. 154.
3. (1935) 69 M.L.J. 844: I.L.R. 59 Mad. 171 (F.B.).

* S. A. No. 809 of 1936. 12th January, 1940.

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S. 65 of the Contract Act does not apply as the plaintiff deliberately incurred the expenses in express contravention of the restriction in the scheme. The trustee's promise to pay and promissory notes by him on behalf of the trust cannot bind the trust either. As the promissory note was not by the trustee for himself a decree against the trustee cannot be granted; with a proper plea and evidence of *quantum meruit* the plaintiff might get some amount.

Appeal against the decree of the Court of the Subordinate Judge of Tiruvarur in A. S. No. 18 of 1935 preferred against the decree of the Court of the District Munsif of Tiruvarur in O. S. No. 282 of 1933.

K. Rajah Aiyar and *R. Sundaralingam* for Appellant.

B. S. Ramachandra Rao and *K. Kameswara Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The appellant brought a suit on two promissory notes for amounts advanced to the Annadhana kattalai for the necessary performance of the duties imposed on the trust. The first defendant was the trustee of the kattalai and the second defendant was the receiver of the kattalai property, who has since been replaced by the executive officer of the temple. It appears from the plaint that the money was not advanced direct to the kattalai. The plaintiff, who had received a power of attorney from the trustee, was managing the kattalai on the first defendant's behalf, receiving income from the property, and making purchases; and the sum claimed is that admitted by the first defendant to be due to the plaintiff on account of provisions and other necessaries supplied to the kattalai in excess of the income. The defendants contended that some of the alleged items of expenditure were not true; but it was found that the plaintiff had properly accounted for the money mentioned in the promissory notes and that it was properly expended on the temple. The second defendant raised another plea and that was that the first defendant had no power to borrow money, that the plaintiff knew of it, and that he was not therefore entitled to recover any of the money, even though it might have been true that he advanced it. The District Munsif of Tiruvarur found both points against the second defendant. In appeal, the Subordinate Judge of Tiruvarur agreed with the District Munsif that the plaintiff had properly accounted for all the money advanced; but he held that the scheme which had been framed for the temple by the High Court absolutely prohibited such an advance

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being made. He therefore found himself constrained to allow the appeal and dismissed the suit.

The attention of the Courts below seems to have been focussed on S. 23 of the scheme, which is to this effect:

"All borrowing from and all lending on interest to the funds of the trust is absolutely prohibited."

The rest of the section deals with the punishments to be inflicted in case of a disobedience of this injunction. It has to be noticed that the word 'borrowing' is followed by 'from', which shows that the prohibition is against borrowing from the funds of the trust. That was not done here; but the section also prohibits lending on interest to the funds of the trust. If the plaintiff, as the terms of his promissory note suggest, had lent money on interest to the trust—even though it was for necessary purposes—I think such a loan would have fallen within the scope of the prohibition under S. 23. But I do not think that S. 23 as it stands meant to work a prohibition of the supplying of articles for the carrying on of the services of the kattalai. Nevertheless, from a reading of the scheme as a whole, there can be no doubt that the purpose of the scheme is that the trustees should not be left in possession of any money at all. As soon as they collect money, they have to deposit it with the treasurer of the temple, they have to submit a budget to the Board of Control three months before the beginning of each year, and they can only spend money in accordance with the budget as accepted. They are then allowed to draw on the amount standing to their credit in the accounts kept by the treasurer for each kattalai and they may not exceed the budget allotment. There can also be no doubt, on a general reading of the scheme, that it was directly against the principle of the scheme that the trustee of the kattalai should try to circumvent certain sections of the scheme by taking supplies from a person and contracting some liability on behalf of the trust. That this disobedience of the scheme was not accidental has been proved by the defendant; and the lower appellate Court has found very clearly that the first defendant deliberately ignored the scheme. He says in paragraph 13 of his judgment:

"It would appear that notwithstanding the scheme, the first defendant as trustee of Annadana kattalai, was never in the habit of submitting his budget to the treasurer. He himself continued to manage the properties of the Annadhana kattalai as though his powers had not been in any way curtailed or restricted. In consequence of the defiant attitude of the first defendant it became necessary for the board of control to apply for the appointment of a

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receiver for the purpose of collecting the income of the properties of the Annadhana kattalai and remitting the same to the treasurer."

The plaintiff was also aware of the prohibition and he knew that the first defendant was disobeying the terms of the scheme. He had attended the meetings of the Board of Control and he knew that the temple and the kattalais were being managed under S. 3 of the scheme.

Although a trustee may not have power to incur debts, yet if a person supplies articles which are necessary far carrying on the services under the trust, then he is entitled to be reimbursed. Two English cases have been quoted. In Ex parte *Chippendale*: Re *German Mining Co.*[1], the directors of a coal-mining company had no powers of raising money except by certain restricted means. They however during the course of the management of some mines in Germany found that they had no money to pay the wages of the miners. If the wages had not been paid, the mines, under the law of the country, would have been closed down and the property of the company would have been lost. It was held that as they had acted beyond their powers as directors and agents in borrowing money, the creditors who had advanced money in order that the miners might be paid, would not be able to have recourse against the company under the Companies Act. Nevertheless, the directors were not merely agents but were trustees of the property of which they were in management; and as trustees they were bound to take all reasonable steps to prevent the property of the company from being wasted. They were therefore not only permitted but bound to borrow money to pay the miners' wages and thus save the property of the company which would otherwise have been lost. In *Troup's case*[2], a somewhat similar case, where directors had no borrowing powers, it was laid down that:

"Where the directors of a company have no power to borrow money, the repayment of money borrowed cannot be enforced by the lender against the company. Yet if the money has been *bona fide* applied to the purposes of the company, the *bona fide* lender is entitled to payment as against the company."

The learned advocate for the appellant has also referred to the principle laid down in the leading case *Lawford* v. *Billericay Rural District Council*[3], that where a corporation asked a contractor to perform certain works which were necessary for the carrying out of the duties of the corporation, the corpora-

1. (1854) 4 De G. M. & G. 19: 43 E R. 415.
2. (1860) 29 Beav. 353: 54 E.R. 664.
3. (1903) 1 K.B. 772.

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tion could not afterwards refuse to pay the contractor for the work he had done, merely because the contract had not been sealed as required by law and so was void. The principle of *quantum meruit* was applied, and it was held that the corporation were not entitled to rely on this fact. It was found that there was an implied contract to reimburse the contractor for any work done by him which was necessary to be done and was required by the corporation to be done. Clearly, Ex parte *Chippendale*: Re *German Mining Co.*[1] and *Troup's case*[2] would not apply to a case where a trustee, far from acting in the interests of the trust and for the trust, acted expressly against the rules which had been laid down for his conduct. In borrowing this money, the trustee committed a breach of trust and the plaintiff knew it. The plaintiff cannot therefore be heard to say that he was enabling the trustee to perform his duty to the trust and was therefore entitled to be compensated for what he has supplied.

With regard to the application of the principle of *quantum meruit*, it may of course be true that if there was no money left to the credit of this particular kattalai and certain services were absolutely necessary, then the plaintiff would be entitled to receive compensation for such money spent as was absolutely necessary. But we do not know what expenditure would have been absolutely necessary in such an extreme case. The plaintiff did not plead this, and the attention of the courts below and of the parties was not directed to this aspect of the question; and so we have no material on which to come to a decision as to what expenditure by the trustee, if any, was absolutely necessary. The learned District Munsif, whose judgment is generally followed by that of the Subordinate Judge, says in para. 7 of his judgment:

"So then there is clear proof in this case that as a matter of fact the plaintiff advanced several sums of money as found in the accounts, Exs. A and B, for the supply of articles absolutely necessary for the purpose of the trust in connection with the daily *puja, abhishekam, naivedyam*, etc."

He draws this conclusion from certain findings of his in para. 6 of his judgment which he gives in the words used by the clerk of the receiver:

"Until the receiver took charge from plaintiff all the *kalapujas* were being done properly, all the functions of the *annadhana* and *abhisheka* kattalais having been regularly and properly done."

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1. (1854) 4 De G M. & G. 19: 43 E.R. 415.
2. (1860) 29 Beav. 353: 54 E R. 664.

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I cannot see how it follows from this that the supply of the articles by the plaintiff was absolutely necessary for the purpose of the trust. A distinction must be drawn between what is necessary for a full and proper conduct of the services, that is, what is desirable, and what is absolutely necessary when there are no funds available to meet the full expenses or where the rules prohibit the spending of money unauthorisedly. All these various duties could have been performed on a less elaborate scale; and if the first defendant had done his duty and had applied to the treasurer for money and the matter had been referred to the Board of Control, the Board would probably have supplied a smaller amount of money which would have permitted the carrying out of these services on a smaller scale. The learned advocate for the appellant has sought to get over this difficulty by quoting the Privy Council decision, *Vibhudapriya Thirtha Swamiar* v. *Lakshmindra Thirtha Swamiar*[1], which is to the effect that where it appears to a creditor advancing money to a trust that the money is being used for the trust and not for the trustee's private purposes and where the money is definitely applied, the creditor cannot be defeated by a contention that the duties could have been performed on a less elaborate scale. That is true only where a trustee acts in the discharge of his duties as trustee. That principle could not be applied where a trustee is acting contrary to the trust or to the rules imposed on him by a scheme. In such a case both the trustee and the creditor know that the money ought not to be spent.

It has been pointed out that this contract has to be viewed in the light of the express words used in S. 65 of the Indian Contract Act and not by the principles laid down in certain English cases which are less liberal. But the language used in S. 65 shows that it does not apply to contracts into which persons deliberately enter, knowing that the contract cannot have any validity and is in express contravention of the rules and restrictions imposed on them. Moreover, it is difficult to see how in this case there ever was a contract—void or otherwise—with the trust. The so-called contract was nothing more than a dishonest device of the plaintiff and the first defendant to defeat the scheme. In making this promise to pay, the first defendant cannot be said to have been acting for the trust; and the plaintiff knew it.

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1. (1927) 53 M.L.J. 196: L.R. 54 I.A. 228: I.L.R. 50 Mad. 497 (P.C.).

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It follows from what has been said above that the plaintiff is not entitled to recover from the trust the amount claimed by him on the suit pronotes. There is no equitable principle that can be invoked by him which will enable the Court to grant a decree. If he had raised a plea of *quantum meruit* and suitable evidence had been let in, it is just possible that he might have succeeded in obtaining a decree for some part of the sum he advanced; but it is not necessary for me to express any opinion on this point.

It is contended that a decree should be given against the first defendant; but the first defendant did not execute the pronote in his personal capacity, but only as trustee of the institution. A petition has been put in to amend the plaint so that the plaintiff may be given some relief against the first defendant; but even if the amendment were made, the plaintiff could not, for reasons given, be given a decree against the first defendant.

The appeal is dismissed with the costs of the second respondent.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

A. L. S. P. P. L. Subramaniam Chettiar by agent Narayanan Chettiar .. *Petitioner**

v.

Annamalai Chettiar by agent Ramaswami Aiyar .. *Respondent (Petitioner).*

Subramaniam Chettiar v. Annamalai Chettiar.

Civil Procedure Code (V of 1908), S. 73—Money decree against grandfather, his son and son's son in favour of A*—Previous decree against grandfather and son in favour of* B*—Adjudication of grandfather and son as insolvents—Execution, attachment and sale of grandson's interest by* A*—Right of* B *to rateable distribution—If decrees in favour of* A *and* B*, against same judgment-debtors.*

A obtained a money decree against a grandfather; his son and son's son and *B* had previously obtained a decree against the grandfather and the son but not against the grandson. On the adjudication of the grandfather and son, *A* attached and sold the grandson's share in execution and *B* put in an application claiming rateable distribution.

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* C. R. P. No. 354 of 1938. 6th December, 1939.

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Held, where a father who is joint with his son becomes insolvent, the right of realising the son's share in the family estate under the pious obligation rule devolves upon the Official Assignee or Official Receiver as the case may be. But if before the Official Assignee or Official Receiver takes steps to enforce that right, a judgment-creditor of the father attaches the son's interest in the estate, the power of the Official Assignee or Official Receiver to sell the son's share is lost, and as the result of the attachment and sale of the grandson's share by *A*, the share becomes available to the executing creditor and all persons who became entitled to rateable distribution under S. 73 of the Civil Procedure Code.

Where a money decree is passed against a grandfather who is joint with his son and grandson it must be taken to be a decree passed against the son and grandson to the extent of their interests in the family property, as they are liable to that extent for his lawful debts. The two decrees are against the same debtor within the meaning of S. 73, Civil Procedure Code and *B* is entitled to have rateable distribution.

Case-law discussed.

Arunachalam Chettiar v. *Kalayappa Chettiar,* (1937) 1 M.L.J. 180, overruled.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Dharapuram dated 1st December, 1937 and made in E. A. No. 1504 of 1937 in E. P. No. 637 of 1937 in O. S. No. 331 of 1931.

K. V. Ramachandra Aiyar for Petitioner.

Respondent not represented.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice—This petition raises a question with regard to the right to rateable distribution given by S. 73 of the Code of Civil Procedure, but when the authorities are examined it is clear that they negative the petitioner's contention. In 1931 the petitioner obtained a money decree against a grandfather, his son and his son's son. The respondent had previously obtained a money decree against the grandfather and the son, but not against the grandson. In 1931, in separate proceedings, the grandfather and the son were adjudicated insolvents. In 1937 the petitioner filed an application for execution of his decree and asked for the attachment of the grandson's interest in the family property. Attachment was ordered and the grandson's interest was sold on 31st August, 1937. Before the sale took place the respondent filed an application for the execution of his decree, and he also asked for the attachment and sale of the grandson's share in the family property. On the strength of this application the respondent claimed to be

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entitled to share rateably in the sum of Rs. 800, which was the amount realised in the execution proceedings instituted by the petitioner. The petitioner objected to the respondent's claim to rateable distribution, but his objection was overruled by the District Munsif of Dharapuram in whose Court the execution petitions were filed and the assets realised. The District Munsif, in rejecting the petitioner's contention, relied on the decision in *Palaniappa Chettiar* v. *Palani Goundan*[1]. The petitioner asks this Court to set aside the District Munsif's order under its revisional powers.

It is now well settled law that where a father who is joint with his son becomes insolvent, the right of realising the son's share in the family estate under the pious obligation rule devolves upon the Official Assignee or the Official Receiver as the case may be. But, if before the Official Assignee or the Official Receiver takes steps to enforce that right, a judgment-creditor of the father attaches the son's interest in the estate, the power of the Official Assignee or Official Receiver to sell the son's share is lost. (See *Sat Narain* v. *Behari Lal*[2], *Seetharama Chettiar* v. *Official Receiver, Tanjore*[3], *Sat Narain* v. *Sri Kishen Das*: *Same* v. *The Bank of Upper India*[4], *Gopalakrishnayya* v. *Gopalan*[5] and *Arunachalam* v. *Sabaratnam*[6].) Therefore, as the result of the petitioner's attachment of the grandson's share the Insolvency Court lost all its interest in that share, which then became available to the petitioner as the executing creditor and to all persons who became entitled to rateable distribution under S. 73 of the Code of Civil Procedure. Before the proceeds of the grandson's property were brought into Court, the respondent filed his application for execution and thereupon became entitled to rateable distribution.

On behalf of the petitioner the argument has been advanced that the respondent's decree was not obtained against the same judgment-debtor and therefore S. 73 does not apply, but this argument cannot be accepted. There is ample authority for holding that where a money decree is passed against a grandfather who is joint with his son and grandson it must be taken

1. (1936) 71 M.L.J. 541.
2. (1924) 47 M.L.J. 857: L.R. 52 I.A. 22: I.L.R. 6 Lah. 1 (P. C.).
3. (1926) 51 M.L.J. 269: I.L.R. 49 Mad. 849 (F.B.).
4. (1936) 71 M.L.J. 812: L.R. 63 I.A. 384: I.L.R. 17 Lah. 644 (P.C.).
5. (1928) 54 M.L.J. 674: I.L.R. 51 Mad. 342.
6. (1939) 1 M.L.J. 889: I.L.R. (1939) Mad. 585.

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to be a decree passed against the son and the grandson to the extent of their interests in the family property as they are liable to that extent for his lawful debts. In *Ramanathan Chettiar* v. *Subramania Sastrial*[1], where the decree of one of two judgment-creditors was against the father while the decree of the other judgment creditor was against the father and his son, but the properties from which the assets had been realized by sale were the ancestral properties of the family of which the father and son were undivided members, White, C. J., held that the decrees were "against the same judgment-debtor" for the purpose of S. 295 of the Code of 1882, to which S. 73 of the present Code corresponds. In *Ramakrishna Chettiar* v. *Viswanathan Chettiar*[2], a Full Bench of this Court (Beasley, C.J., Cornish and Pandrang Row, JJ.) held that the legal representative of a deceased person against whom a decree was passed in his life time but which was sought to be executed against his property in the hands of his legal representative was the same judgment-debtor within the meaning of S. 73. Pandrang Row, J., in whose judgment Beasley, C.J., concurred, observed that it was obvious that a strict literal construction of the expression, "the same judgment-debtor" could not be adopted in the sense that the decrees must be against the same persons *eo nomine*, and the weight of authority appeared to favour a liberal construction of the expression "the same judgment-debtor". The decision of White, C.J., in *Ramanathan Chettiar* v. *Subramania Sastrial*[1], was referred to with obvious approval.

In *Swaminatha Aiyar* v. *Saivu Rowthan*[3], Venkataramana Rao, J., held that when a decree has been passed against a manager of a joint Hindu family, the other members of the family must be deemed to be judgment-debtors as well, and where another decree-holder has obtained a decree against the manager and the other members of the family, they are entitled to rateable distribution. The learned Judge considered that the Full Bench decision in *Ramakrishna Chettiar* v. *Viswanatha Chettiar*[2], applied. There was no insolvency in this case, but in a later decision, *Palaniappa Chettiar* v. *Palani Goundan*[4], Venkataramana Rao, J., had to consider the same question in connection with insolvency proceedings. In that case the respondent filed

1. (1902) 12 M L.J. 276: I.L.R. 26 Mad. 179.
2. (1935) 69 M.L.J. 711: I.L.R. 59 Mad. 93 (F.B.).
3. (1935) 43 L.W. 624.
4. (1936) 71 M.L.J. 541.

a suit against the father and attached before judgment the family property. He eventually obtained a decree, and five months later the judgment-debtor was adjudicated an insolvent. Subsequent to the adjudication, the petitioner, with the leave of the Insolvency Court, filed a suit against the father and his sons. The petitioner also applied for attachment before judgment of the son's share in the joint family property. A decree was in due course passed in his favour and the son's shares were realized in execution proceedings. Before the sale took place the respondent applied for the execution of his decree by the sale of the family estate and claimed rateable distribution. The learned Judge held that he was entitled to rateable distribution as the decree obtained against the father and the father and the sons were decrees passed against the same judgment-debtor. A similar decision was given by the learned Judge in *Ramayya* v. *Rangaraju*[1].

The only case which lends support to the petitioner's argument is *Arunachalam Chettiar* v. *Kalayappa Chettiar*[2], which was decided by Horwill, J. There the respondents attached before judgment the estate of a joint family consisting of the father and a son. A decree was obtained and the property was subsequently brought to sale, the purchase money being deposited into Court. The father then became an insolvent, and the father's share of the proceeds was handed over to the Official Receiver. The petitioner had obtained a decree against the father on a promissory note and applied for a rateable distribution. His application was filed before the proceeds had been deposited into Court. Horwill, J., considered that the petitioner was not entitled to rateable distribution. It would appear from his judgment that he considered that the Full Bench decision in *Ramakrishna Chettiar* v. *Viswanatha Chettiar*[3], had no application and he laid stress on the fact that the petitioner did not make the son a party to the execution proceedings on the ground that he was liable for his father's debts and that the Court did not know that the decree was obtained against the father for a debt binding on the son. In these circumstances he rejected the petitioner's claim to rateable distribution. This decision is in direct conflict with the judgments of Venkataramana Rao, J.,

1. (1938) 1 M.L.J. 325. 2. (1937) 1 M L.J. 180.
3. (1935) 69 M.L.J. 711: I.L.R. 59 Mad. 93 (F.B.).

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in *Palaniappa Chettiar* v. *Palani Goundan*[1], and *Ramayya* v. *Rangaraju*[2], and it also runs contrary to the decision of the Full Bench in *Ramakrishna Chettiar* v. *Viswanatha Chettiar*[3]. The judgment of Horwill, J., was considered by Venkataramana Rao, J., in *Ramayya* v. *Rangaraju*[2] and I am in entire agreement with the observations of Venkataramana Rao, J., which are these:—

"The learned Judge seems to be of the opinion that where there is a decree against the father alone it cannot be said that the decree was obtained against the father for a debt binding on the son. It may be so. But once there is a decree against the father the creditor is entitled to enforce the said decree against all the joint family property including the shares of the sons until the sons choose to take exception to it either in execution or by way of a suit that the said debt is one which they are not liable to pay under the Hindu Law. So long as the decree stands and the property sold is joint family property, no question as to the binding nature of the debt arises in the consideration of the question whether the judgment-debtors are the same."

It follows that I consider the judgment of Horwill, J., to be erroneous and should be overruled. It also follows that I consider that the decision of the District Munsif in the present case was right. The petition will be dismissed but as the respondent has not appeared there will be no order as to costs.

I wish to express the appreciation of the Court for the great assistance which it has received from Mr. K. V. Ramachandra Ayyar who has appeared on behalf of the petitioner. He has placed all the relevant authorities before the Court.

Krishnaswami Aiyangar, J:—I agree.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Koka Audinarayana Rao Naidu .. *Petitioner** (*Plaintiff*)

v.

Bhavaraju Lakshminarayana Rao .. *Respondent* (*Defendant*).

Audinarayana Rao Naidu *v.* Lakshminarayana Rao.

Principal and agent—Contract of agency—Accounts to be rendered at the place of business—Deciding factor regarding the place of performance—Contract Act (IX of 1872), S. 182—Inference as to place of performance—Jurisdiction for entertaining suit on accounts.

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1. (1936) 71 M.L.J. 541. 2. (1938) 1 M.L.J. 325.
3. (1935) 69 M.L.J. 711: I.L.R. 59 Mad. 93 (F.B.).

*C.R.P. No. 1248 of 1936. 22nd February, 1939.

Audi-narayana Rao Naidu v. Lakshmi-narayana Rao

It is the nature of the main contract that must determine the intended or presumed place of performance.

There is distinction between the contract itself and the legal obligation or liabilities incidental to the contract of principal and agent.

Where, within the meaning of S. 182 of the Contract Act an agent was employed to do acts for his principal who resided at *C*, the legitimate inference would be that the contract was to be performed at *C*. It is only as one of the legal incidents arising out of the relationship of principal and agent that S. 213 provides that an agent is bound to render proper accounts to the principal. This cannot be read that there was an express contract between the parties to render accounts so as to support the inference that the intention must have been to render the account at the principal's place. If anything, the words in the section imposing that duty 'on demand' on the agent suggest that the demand should be made at the agent's place of business. Every consideration of convenience is also in favour of that view, because the books relating to the business of the agency and the material information connected therewith might naturally be expected to be available at the place of business of agency.

Hence it was the Court of the place where the agent was doing business that had jurisdiction to entertain a suit for accounts as no part of the cause of action arose in the principal's place of residence.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the decree of the District Court of Ganjam in C.M.A. No. 66 of 1935 preferred against the decree of the Court of the District Munsiff of Chicacole in O. S. No. 39 of 1933.

B. Jagannadha Das for Petitioner.

Ch. Raghava Rao and *M. Sriramamurthi* for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition arises out of a suit for accounts filed by a principal against his agent. Both the Courts have held that no part of the cause of action arose within the limits of the Chicacole Munsif's Court's jurisdiction and the plaint has been returned for presentation to the proper Court, as the conditions of cls. (*a*) and (*b*) of S. 20 of the Civil Procedure Code are not satisfied in the present case.

The learned Counsel for the petitioner contends that either as a matter of law or even as an inference of fact as to the intended place of performance of the contract, I should hold that the cause of action arose in whole or in part within the Chicacole Court's jurisdiction. I am unable to accede to this contention. As pointed out by the learned District Judge, the reasoning in *Tika Ram* v. *Daulat Ram*[1], where a very similar question arose, is clearly in favour of the view taken by the Courts below.

1. (1924) I.L.R. 46 All. 465.

Audi-narayana Rao Naidu *v.* Lakshmi-narayana Rao.

Mr. Jagannadha Das, the learned Counsel for the petitioner, has mainly relied on the decision of the Judicial Committee in *Soniram Jeetmull* v. *R. D. Tata & Co., Ltd.*[1], I am not able to accept his interpretation of that judgment. It is difficult to read that decision as laying down that as a rule of law, the principle that the debtor is bound to seek out his creditor and pay his debt is applicable in this country even for the purpose of determining the local jurisdiction of particular Courts. Their Lordships have taken care to indicate at the end of the judgment that their decision was based upon the inference drawn from the terms of the contract itself or from the necessities of the case. In an earlier part of the judgment, they referred to the fact that the business transactions out of which the outstanding debts arose in that case took place in Rangoon where a branch of the plaintiff's firm was situate and from this circumstance and from the nature of the contract, they seem to have drawn the inference that the parties must have intended by necessary implication that the monies were to be paid in Rangoon.

Even assuming that the English rule either in terms or by analogy could be applied in this country, I am unable to extend it to a case like the present, which did not arise out of the relationship of debtor and creditor. Where the contract itself is one of loan, it might be possible to presume that payment must have been intended to be made at the creditor's place. But here the contract was one of agency and it is not disputed that though the principal was resident at Chicacole, the agent who was a resident of Cocanada was to attend to business to be done at Cocanada.

It seems to me necessary to emphasise the distinction between the contract itself and legal obligations or liabilities incidental to the contract of principal and agent; within the meaning of S. 182 of the Contract Act, the agent was employed to do acts for the principal at Cocanada. The legitimate inference therefore is that the contract was to be performed at Cocanada. It is only as one of the legal incidents arising out of the relationship of principal and agent that S. 213 provides that an agent is bound to render proper accounts to the principal. This cannot be read as if there was an express contract between the parties to render accounts so as to support the inference that

1. (1927) 53 M.L.J. 25: L.R. 54 I.A. 265: I.L.R. 5 Rang. 451 (P.C.).

the intention must have been to render the account at the principal's place. It is also noteworthy that the section imposes the duty "on demand" by the principal. If anything, these words suggest that the demand should be made on the agent at his place of business. Every consideration of convenience is also in favour of that view because the books relating to the business of the agency and all material information connected therewith might naturally be expected to be available at the place of business of the agency.

Audi-narayana Rao Naidu *v* Lakshmi-narayana Rao.

Mr. Jagannadha Das contended that if on the taking of accounts it should be found that money was payable by the agent to the principal, the relationship of debtor and creditor would arise between the agent and the principal. But it is equally conceivable that on the taking of accounts it might be found that money would be payable by the principal to the agent. It does not therefore seem to me right to base any inference as to the intended place of performance on the possible result of the taking of accounts. It is the nature of the main contract that must determine the intended or presumed place of performance. The suit itself has been rightly framed as a suit for accounts and it is on that basis that the question of jurisdiction must be determined.

I am of opinion that the Courts below were right in the view they took that no part of the cause of action arose at the principal's place of residence, in the circumstances of the case. The Revision Petition fails and is dismissed with costs.

K.C. *Revision petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KUNHI RAMAN.

Visalakshi Ammal .. *Appellant** *(4th Defendant)*

v.

C. Krishnaveni Ammal and others .. *Respondents (Plaintiffs).*

Equitable mortgage—Title deeds handed over 4 or 5 days before advance of loan—Letter of collateral security on date of loan evidencing deposit not registered—Admissibility in evidence—Registration Act, S. 17.

Visalakshi Ammal *v.* Krishnaveni Ammal.

A memorandum of equitable mortgage by deposit of title deeds (title deeds having been handed over previously to mortgagee for inspection and retained by him as security for loan advanced later) stated:—"On executing

* O. S. A. No. 30 of 1938. 4th September, 1939.

Visalakshi Ammal v. Krishnaveni Ammal.

a pronote to you this date, Rs. 1,900 has been received in cash from you. For this sum I have kept with you as security house.......... Madras, and the original title deeds relating to the property. At the time when I discharge the aforesaid bond, I shall take back this letter as well as the aforesaid title deeds. To this effect have I executed this collateral letter with consent".

Held, the memorandum constituted the bargain between the parties and operated to declare the rights of the mortgagees in the property. It falls within S. 17 of the Registration Act and not having been registered cannot be admitted in evidence.

On appeal from the judgment and decree of the Hon'ble Mr. Justice Wadsworth dated 7th day of December, 1937, in the exercise in the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 351 of 1934.

K. N. Mohanarangam Pillai for Appellant.

Srinivasaragavan and *Thyagarajan, K. Narasimha Aiyar* and *T. V. Subramania Aiyar* for Respondents.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—This appeal raises the question whether an equitable mortgage is unenforceable by reason of the non-registration of a letter signed by the mortgagor at the time of the deposit of the title deeds. One P. M. Sadasiva Chetty, his sons Subramanian and Somasundaram (the third and fourth respondents), his brother Gangadhara Chetty and Gangadhara Chetty's son Thayamanava (the third defendant in the suit) constituted an undivided Hindu family. The family owned immovable property in Madras, 2·10 acres of land in Arasur village, Chingleput District and 42 acres of land and a rice mill in Ponneri village, which is also in the Chingleput District. The properties in Madras consisted of three houses and their sites, known as 16, Audiappa Chetti Street; 41, Guruvappa Chetty Street and 105, Egmore High Road, respectively. On the 2nd August, 1930, Sadasiva, who was the manager of the family, borrowed from the first and second respondents Rs. 1,900 on a promissory note and as security deposited the title deeds of No. 16, Audiappa Chetty Street. Before us it has not been disputed that this money was borrowed for the purposes of the family. At the time of the deposit Sadasiva signed and delivered to the mortgagees a letter in Tamil of which the following is the official translation:—

"On the 2nd August, 1930, the collateral letter executed in favour of two persons (1) C. V. Krishnaveni Ammal and (2) C. Sundaram Chetti, residing in house No. 3, Cuddapah Rangiah Chetty Street, Periamet, Madras, by P.M.

Sadasiva Chettiar, son of the late P. Munisami Chetti, Vannia Vaisya caste, Saivaite, merchant, residing in house No. 16, Audiappa Chetti Street, Chintadripet, Madras. On executing a pro-note to you this date, Rs. 1,900 (rupees one thousand and nine hundred) has been received in cash from you. For this sum, I have kept with you as security, house No. 16, Audiappa Chetty Street, said petta, said Madras and the original title deeds relating to the property. At the time when I discharge the aforesaid bond, I shall take back this letter as well as the aforesaid title deeds.

To this effect have I executed this collateral letter with consent."

On the 22nd August, 1931, 41, Guruvappa Chetty Street, and 105, Egmore High Road, were mortgaged to the sixth defendant in the suit. He having died is now represented by his executrix, the sixth respondent. This mortgage was effected by a registered instrument signed by Sadasiva for himself as manager of the joint family and as guardian of the third defendant, whose father was then dead. On the 19th April, 1932, Sadasiva and his eldest son, the third respondent, executed two mortgage deeds in favour of the first and second respondents, one to secure Rs. 2,000, made up of the Rs. 1,900 borrowed on the 2nd August, 1930 and a further advance of Rs. 100, and the other to secure Rs. 500. The security for the first of these mortgages was No. 16, Audiappa Chetty Street and this mortgage was intended to take the place of the equitable mortgage. The security for the sum of Rs. 500 was the 42 acres of land and the rice mill in Ponneri village. The suit out of which the appeal arises was filed to enforce the mortgages.

On the 24th March, 1931, the minor third defendant through his mother, the appellant, instituted a partition suit on the Original Side of this Court (C. S. No. 471 of 1931). The minor died during the pendency of the suit and the appellant was made a party as his legal representative. The mortgage of the 19th April, 1932, which replaced the equitable mortgage of the 2nd August, 1930, having been created after the partition suit had been filed did not affect the minor's estate and the mortgagees are relegated to their rights, if any, under the equitable mortgage. The learned trial Judge (Wadsworth, J.) held that the letter which was given with reference to the deposit of title deeds did not require registration and therefore the minor's estate was bound by the equitable mortgage. On this basis he granted the mortgagees a mortgage decree in respect of the Rs. 1,900. Other contentions were raised before the learned Judge but the appeal has been confined solely to the

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question whether the equitable mortgage of the 2nd August, 1930, can be enforced.

In the mortgage deed of the 19th April, 1932, for Rs. 2,000, made up of the Rs. 1,900 borrowed on the equitable mortgage and the further advance of Rs. 100, there is the following recital:

"A sum of Rs. 1,900 (rupees one thousand and nine hundred) has already been borrowed from you on the 2nd August, 1930, by executing a bond and by giving you a collateral security letter as security thereof."

The appellant's case is that the letter given by Sadasiva at the time of the deposit of title deeds, read in the light of the recital in the mortgage-deed of the 19th April, 1932, just quoted, must be construed as a declaration of the mortgagees' rights on the property and therefore required registration under S. 17 of the Registration Act. Not having been registered it could not be admitted in evidence by reason of S. 49 of the Registration Act. The learned Judge treated the letter as a mere memorandum of a transaction previously completed and on this footing held that it did not require registration.

Before considering certain authorities which have been quoted to us I will revert to the facts. As I have already stated, the execution of the promissory note, the deposit of the title deeds and the execution of the letter all took place on the 2nd August, 1930. It may be taken that the signing of the promissory note and the deposit of title deeds took place before the letter was signed in actual point of time. The evidence discloses that five or six days before the 2nd August the title deeds were handed over to the mortgagees to enable their representative to scrutinise them, the understanding being that if the title deeds proved to be in order they would advance money on equitable mortgage. The learned Judge has held that inasmuch as the second respondent said that the examiner of the documents had approved of the title five or six days before 2nd August, 1930, it was reasonable to infer that for these five days the title deeds remained with the second respondent as security for the loan and therefore there was a completed mortgage agreement some days anterior to the 2nd August, 1930. I find myself unable to share this opinion. The title deeds were handed over for the purpose of examination of the title and they must be deemed to have remained with the mortgagees for that purpose until they intimated to Sadasiva on the 2nd August, 1930, that they were

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willing to advance the money. On the evidence both of the second respondent and of the person who examined the deeds it is clear that they were handed over merely for the purpose of examination of title and that there was no deposit by way of equitable mortgage until 2nd August, 1930. The case, therefore, cannot be decided on the basis that there was a completed transaction before that date. With these observations I will now proceed to the examination of the authorities.

In *Subramanian* v. *Lutchmani*[1], the Privy Council had to consider a memorandum which was signed and delivered by the mortgagors at the time of the deposit of title deeds by way of equitable mortgage. It was held in that case that oral proof of the mortgage was inadmissible because the document drawn up constitued the bargain between the parties. There the memorandum was in the following terms:—

"We hand you herewith title deeds relating to fifth class Lot Nos. 78, 79 and 80, Block E, each measuring 25 by 50, with building thereon belonging to Saleman Ahmad Seedat, also his promissory note for rupees sixty-three thousand (Rs. 63,000) due us, this please hold as security against advances made to us; we also hand you second mortgage executed in our favour by C Rangaswamy Mudaliar on first Class Lot No. 6 in Block F-1. On this we had advanced Rs. 32,000. Please also hold this as further security against advances made to us. We promise not to deal with same till your amount due is fully paid and satisfied."

Lord Carson who delivered the judgment of the Board said that their Lordships had no doubt that the memorandum in question was the bargain between the parties, and that without its production in evidence the plaintiff could establish no claim, and as it was unregistered it ought to have been rejected. Their Lordships were here applying the principles laid down in *Pranjivandas Jagjivandas Mehta* v. *Chan Mah Phee*[2] and *Shaw* v. *Foster*[3].

The question of the admissibility of a memorandum relating to a deposit of title deeds was considered by the Privy Council in *Obla Sundarachariar* v. *Narayana Aiyar*[4]. There the memorandum consisted of a list of title deeds with the following introductory words:—

"Written to E. N. A. Samoo Pattar by Krishnaswami Aiyar, of S. V. Ramaswami Aiyar and Brothers. As agreed upon in person I have delivered to you the undermentioned documents as security."

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1. (1922) 44 M.L.J. 602: L.R. 50 I A. 77: I.L.R. 50 Cal. 338 (P.C.).
2. (1916) 31 M.L J. 155: L.R. 43 I.A. 122: I.L.R. 43 Cal. 895 at 900 (P.C.).
3. (1872) L.R. 5 H.L. 321.
4. (1931) 60 M.L.J. 506: L.R. 58 I.A. 68: I.L.R. 54 Mad. 257 (P.C.).

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S. 17 of the Indian Registration Act requires registration of non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of the value of Rs. 100 and upwards, to or in immovable property. Lord Tomlin, in delivering the judgment of the Board, pointed out that the question which fell to be determined was whether the memorandum, having regard to its true construction and the circumstances in which it came into existence and passed into the hands of the plaintiff, was an instrument of this nature. Their Lordships regarded the memorandum as a list of the documents deposited and nothing more. It did not embody the terms of the agreement between the parties, and therefore did not require registration. While their Lordships did not think that the language of Lord Carson in *Subramanian* v. *Lutchman*[1] conveyed or was intended to convey the meaning that no memorandum relating to a deposit of title deeds could be within S. 17 of the Registration Act, unless it embodied all the particulars of the transactions of which the deposit formed part. they were of opinion that no such memorandum could be within the section unless on its face it embodied such terms and was signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit was concerned it constituted the agreement between the parties.

In the recent case of *Sir Hari Sankar Paul* v. *Kedar Nath Saha*[2], the Privy Council after reviewing their earlier decisions expressed themselves thus:—

"Their Lordships are of opinion that where, as here, the parties professing to create a mortgage by deposit of title deeds contemporaneously enter into a contractual agreement, in writing, which is made an integral part of transaction and is itself an operative instrument and not merely evidential, such a document must under the statute be registered."

Therefore what is to be considered in the present case is whether the memorandum of the 2nd August, 1930, was made an integral part of the transaction and is an instrument intended to declare the right of the mortgagees in the property and not merely a record of what had transpired.

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1. (1922) 44 M.L.J 602: L.R. 50 I.A. 77: I.L.R. 50 Cal. 338 (P.C.).
2. (1939) 2 M.L.J. 522: L.R. 66 I.A. 184: I.L.R. (1939) 2 Cal. 243: 43 C.W.N. 806 (P.C.).

The memorandum under discussion is written in part in the past tense. It states:—

"On executing a pronote to you this date, Rs. 1,900 has been received in cash from you. For this sum, I have kept with you as security house No. 16, Audiappa Chetti Street, said petta, said Madras, and the original title deeds relating to the property."

But it goes on to say:

"At the time when I discharge the aforesaid bond, I shall take back this letter as well as the aforesaid title deeds"

and concludes with this statement:

"To this effect have I executed this collateral letter with consent."

If the letter is read as a whole there is a great deal to be said for the argument that it was intended to constitute the bargain between the parties, but our attention has been drawn to the decision of Schwabe, C. J. and Ramesam, J., in *Krishnayya* v. *Ponnuswami Aiyar*[1], where it was held that a memorandum in the following terms did not require registration:

"Collateral security letter in respect of a house executed in favour of Messrs. Peruru Viswanadham and Koneti Desikacharyulu Company of Madras. As you have this day obtained an assignment of the sum of Rs. 1,945 due by me to Messrs. Peruru Viswanadham & Co., the same being the sum of principal and interest due, I have this day executed a pronote in your favour for this sum and the sum of Rs. 500, taken to-day, *i.e.*, the total of Rs. 2,445; so let it be known that for that I have retained with you as collateral security my document of the Collector's certificate No. 815 in respect of my house bearing door No. 11 in Tiruvattiswaranpet, Madras."

This memorandum has much in common with the memorandum under consideration in the present case. It is described as a collateral security and states what had preceded its execution. The learned Judges, however, treated it merely as a record of a completed transaction made for the purpose of recording facts for the information of a new firm. The position here is not analogous and there is the further factor that in the mortgage deed of the 19th April, 1932, which the mortgagees obtained from the mortgagor the memorandum of the 2nd August, 1930, is described not only as a collateral security letter but as security for the loan. Can it be said in these circumstances that the parties were merely contemplating a record of a completed transaction and not an operative instrument? When the memorandum is read in the light of the recital in the subsequent deed of mortgage it seems to me that the only conclusion open is that it constituted the bargain between them and

1. (1923) 46 M.L.J. 295: I.L.R. 47 Mad. 398.

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operated to declare the rights of the mortgagees in the property. Consequently I hold that the memorandum falls within S. 17 of the Registration Act and ought to have been registered. Not having been registered it cannot be admitted in evidence which means that the equitable mortgage cannot be proved.

I would allow the appeal with costs both here and below against the first and second respondents.

Kunhi Raman, J.

Kunhi Raman, J.—I agree.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Natesa Pillai and others .. *Appellants** (*Petitioners*)

v.

Venkatarama Aiyar and another .. *Respondents* (*Respondents*).

Natesa Pillai v. Venkatarama Aiyar.

Civil Procedure Code (V of 1908), O. 21, r. 90—Sale held on a date expressly proclaimed to be not the date—Illegal—Sale vitiated.

A sale which is held on a day on which it has been expressly proclaimed that it shall not take place is not valid at all. It will be vitiated by illegality and must be therefore set aside.

Appeal against the order of the Court of the Subordinate Judge of Mayavaram dated 26th July, 1937 and made in E. A. No. 287 of 1935 in E. P. No. 25 of 1934 in O. S. No. 60 of 1932.

S. Muthiah Mudaliar for Appellants.

C. A. Seshagiri Sastri for Respondents.

The judgment of the Court was delivered by

Stodart, J.

Stodart, J.—The appellants are the judgment-debtors. They applied to the Court below under O. 21, r. 90 to set aside a Court sale of their property held on 12th August, 1935, on the ground that there was irregularity in publishing and conducting it, which resulted in the property being sold for a price much below its real value. The objections of the appellants were not stated with any degree of clarity in their application to the lower Court but in the course of the hearing it was urged that the sale was also vitiated by illegality. For the

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*A.A.O. No. 104 of 1938. 11th October, 1939.

Natesa Pillai *v.* Venkatarama Aiyar.

Stodart, J.

Court at the beginning of its judgment states that:

"It is urged *inter alia* that there has been material irregularity and illegality and fraud in the publication and conduct of the sale."

The Court held that the price fetched at the sale was not unduly low, that there was no material irregularity or illegality in publishing or conducting it and that the price fetched at the sale even if considered to be low was not the result of the alleged irregularities or illegalities. Hence this appeal. The contesting respondents here are the decree-holder, and the purchaser at Court auction who opposed the petition in the lower Court. The latter is the decree-holder's father.

The questions we have to decide are:

1. Was the price fetched at the sale unduly low so that it can be said to have resulted in substantial loss to the judgment-debtors?

2. If so was that loss due to material irregularity or fraud in publishing or conducting the sale?

3. Was the sale vitiated by illegality?

* * * * *

[After considering the circumstances whether the price was so low as to result in substantial loss to the judgment-debtors and finding against that objection their Lordships proceeded as follows.]

In the light of all these circumstances we agree with the learned Sub-Judge that judgment-debtors have not shown that they suffered any substantial injury by reason of the price fetched at the sale. And in this view of the case it is not necessary for us to decide the second question which arises in this appeal, namely, whether the learned Sub-Judge was wrong in holding that there was no irregularity or fraud in publishing or conducting the sale. We proceed therefore to the third point. Was the learned Sub-Judge wrong in holding that the sale was not vitiated by illegality? On this point we think the appellants are entitled to succeed. For reasons which we shall presently state we think the sale was vitiated by illegality. And in such a case the sale must be deemed to be altogether void. In order to set aside a sale on the ground of illegality it is not necessary for the Court to hold that the judgment-debtor has been materially prejudiced by the sale. For the sale itself is a nullity. In this particular case we are compelled to hold that the sale was held on a day which was not a day on which it had

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been advertised to take place or a day to which it had been adjourned. The sale was originally posted to 8th July, 1935. It was adjourned to the 9th; then to the 10th and then to the 11th, the order of the Court being taken for every adjournment. Then on the 11th it was ordered to be continued from day to day till the 26th and it was further directed that the sale would be on the 26th. This was in our opinion an irregularity. It would not have been irregular if the Court had directed that the sale should be adjourned from day to day till satisfactory bids were forthcoming and that these *de die in diem* adjournments should not contiuue after the 26th. But for the Court to order on the 11th that the sale should not be concluded till the 26th amounted to an adjournment of the sale for 15 days. And O. 21, r. 69 (2) as it then existed laid down the rule that a sale should not be adjourned for a longer period than 7 days without a fresh proclamation unless the judgment-debtor consents to waive it. And there is no indication here that the judgment-debtor did so consent. However it is not this irregularity which forms the basis of our present decision. We merely mention it in passing. We now come to the events of the 26th July. There was no sale on that day. And the Court made an order that the auction should be continued for 10 days from the 27th. It further ordered that the sale would be held on the 5th August. Moreover it is clear that the order of the Court was taken as meaning that there would be no auction after the 5th August. For the decree-holder, forthwith caused notices to be printed and circulated in the villages to the effect that, as per order of the Court, the auction would be held continuously from the 26th July to the 5th August and would be closed on the 5th August. These notices which were headed "sale notices", were not only distributed in the villages and published in a local newspaper but also, presumably under the orders of the Court, were published in the same manner as regular proclamations of sale. They were proclaimed by beat of tom tom in the villages where the lands are situated, and were affixed to posts planted in the lands comprised in the notices. And the fact that these formalities had been observed was certified by the Village Munsif, who also obtained in the certificate the attestation of no less than 28 witnesses. It is abundantly clear therefore that the Court directed that this long drawn out auction would be closed on the 5th August: that this fact was made known to all concerned who might have

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been present at the Court when it was made: and that it was forthwith widely pnblished in the villages where the lands are situated. (*See* Ex. XXI series and Ex. XXV and Ex. XXVI.)

But there was no sale on the 5th of August. Nor was the auction closed on that date. On that day the decree-holder represented that the auction sale should be continued for another week and deposited Rs. 3-8-0 for the expenses of conducting the sale on seven more successive days. The Court passed no orders on this request other than an order that the money so paid should be accepted. And the property was in fact put up for auction on the 6th August and successive days and eventually knocked down on 12th August for Rs. 32,100 to the decree-holder's father the upset price being Rs. 32,087, the amount of the sale warrant.

The Court's action in not selling the property on the 5th August or concluding the sale on that day was highly irregular inasmuch as it had been widely proclaimed that that was the latest date of sale. Its action in selling the property on a date subsequent to that date was positively illegal. A sale which is held on a day on which it has been expressly proclaimed that it shall not take place is not a valid sale at all. For that reason we must hold that this sale was vitiated by illegality, that it was a nullity, and must therefore be set aside. We allow the appeal with costs both here and in the lower Court.

K.C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Gollakota Suryanarayanamurthi and another .. *Petitioners** (*Accused-Appellants*).

Suryanarayanamurthi, *In re.*

Penal Code (XLV of 1860), Ss. 148, 149 and 427—Offence under—Dispute as to land—One party putting up structures—Other party demolishing them—Court not deciding question of ownership of land—Conviction for offence under Ss. 148, 149 and 427—Sustainability.

The petitioners were convicted for offences under Ss. 148, 149 and 427 under the following circumstances: for some time before the occurrence there was a dispute between the villagers headed by the petitioners on one side and the complainant on the other as regards a certain vacant site which had been purchased by the complainant. The villagers claimed the site as part of communal land required and used for religious purposes, whereas the complainant claimed it to be private land which he had obtained under a sale

* Crl. R. C. No. 564 of 1938. 15th December, 1938.
(Crl. R. P. No. 535 of 1938).

Surya-narayana-murthi, *In re.*

deed. One or two attempts made by the complainant to build a house on the site proved fruitless on account of the obstruction offered by the other party but finally he put up walls very hastily having obtained police protection for his workmen. The next day the petitioners went to the land and under their instructions the villagers pulled down the walls by using crowbars, pick-axes, etc.

Held, that the convictions of the petitioners under Ss. 148, 149 and 427, Indian Penal Code, could not stand in the absence of any finding as to the ownership of the site on which the walls were put up. If really it was a site to which the complainant had no individual right, and if the site really belonged to the villagers generally and had been set apart for public purposes they were entitled as a matter of law to remove the obstruction to the enjoyment of the site and the mere removal of the walls in those circumstances would not amount to a criminal offence.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Sessions of the East Godavari Division dated 2nd August, 1938 and made in Crl. App. No. 38 of 1938 preferred against the judgment of the Court of the Sub-Divisional Magistrate of Amalapuram in C. C. No. 25 of 1938.

T. M. Kasturi for Petitioners.

K. Venkataraghavachari for *The Public Prosecutor* (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioners in this case are two out of the 28 persons who were charged with a number of offences, namely, offences punishable under Ss. 148, 149, 323 and 427 read with S. 114, Indian Penal Code, in connection with an occurrence which took place at about 8 P.M. on the 14th November, 1937, in the village of Modekurru. There is no doubt that for some time before the occurrence there was a dispute between the villagers headed by the first petitioner, the Village Munsiff, and also to some extent by the second petitioner on the one side, and P. W. 1 the complainant on the other as regards a certain vacant site which had been purchased by the complainant about two years ago. The villagers claimed the site as part of communal land required and used for religious purposes, whereas the complainant claimed it to be private land which he had obtained under a sale-deed. One or two attempts made by the complainant to build a house on the site proved fruitless on account of the obstruction offered by the first petitioner and others. Finally it would appear that the Police Sub-Inspector took a strong line in the matter in favour of the complainant

Surya-
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In re.

as a result of the instructions given to him by the Deputy Superintendent of Police, and he went to the village with a party of constables; in these circumstances the complainant appears to have engaged a large number of coolies and built up the walls in one day to a height of several feet, intending to put a roof the very next day. It was in the evening of the day after the walls had thus been hastily built that the occurrence is said to have taken place. A large number of villagers headed by accused 1 and 2, that is, the petitioners are said to have gone to the place, and under the orders of the latter, the rest of the villagers are said to have pulled down the walls by using crowbars, pick-axes, etc. It is also alleged that the complainant was beaten with a cane or walking stick by accused 1 and 2. There can be no doubt that the complainant had injuries on his person as is seen from the medical evidence, and there is no reason to suppose that he did not receive them at the time of the occurrence. The Magistrate who heard the case was of the opinion that the evidence of the prosecution was not reliable so far as 26 out of the 28 accused were concerned and these 26 were discharged and the case was proceeded against only accused 1 and 2. As regards the offences punishable under Ss. 148, 149 and 427, I am of opinion that the convictions cannot stand in the absence of any finding as to the ownership of the site on which the walls were put up. If really it was a site to which the complainant had no individual right, and if the site belonged to the villagers generally and had been set apart for public purposes they were entitled as a matter of law to remove the obstruction to the enjoyment of the site, and the mere removal of the walls in those circumstances would not amount to a criminal offence. There is no finding on this question by either of the Courts below. In these circumstances, it is impossible to support the convictions under the above sections. The common object of demolishing the walls cannot in these circumstances be regarded as an unlawful one. There is nothing to show that any force or show of force was intended to be displayed as against the complainant or his party. Crowbars and pick-axes were taken only for the purpose of pulling down the walls and not for any other purpose. The offence of rioting therefore has not been made out by the prosecution. In the circumstances it is really difficult to say that the villagers did not honestly believe that they were within their rights in pulling down the walls without doing any injury to the complainant or his friends.

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The convictions therefore of the petitioners under these sections are accordingly set aside and they are acquitted of the same.

As regards the convictions under S. 323, Indian Penal Code, namely, for causing hurt to the complainant, I see no sufficient reason to doubt the correctness of the convictions. The complainant was, as I have already observed, undoubtedly beaten and injured at the time of the occurrence and according to him it was the two petitioners who beat him. It may be that he is not quite reliable as a witness but on this point there is no reason to upset the concurrent findings of the Courts below that it was the petitioners who caused hurt to him. The convictions are therefore upheld; but the sentences appear to be unnecessarily severe. The hurt was simple and in the circumstances did not call for a sentence of imprisonment. The sentence therefore under S. 323, Indian Penal Code, on the petitioners is reduced to a fine of Rs. 50, in the case of each and in default of payment to one month's rigorous imprisonment. 14 days' time is given for payment of this fine into Sub-Divisional Magistrate's Court.

The petitioners were also ordered to furnish security for keeping the peace but in the view that I have taken of the case, this order is not necessary; that order is also set aside and the bonds if executed should be cancelled.

B. V. V. *Sentence modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Katta Virayya and others .. *Appellants** (*Plaintiffs*)

v.

The Official Receiver, Kistna and others .. *Respondents* (*Defendants*).

Virayya *v.* Official Receiver, Kistna.

Insolvency—Sale of property by Official Receiver—If ordinary Civil Court has power or control over the acts of Official Receiver—Mere irregularity or inadequacy of price if ground for setting aside sale in a suit in a Civil Court.

Where a suit is filed in the ordinary Civil Court for setting aside a sale of the insolvent's property by the Official Receiver a mere irregularity or inadequacy of price would be no ground for setting aside the sale. A sale can be set aside in a Civil Court only on grounds similar to those on which a

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*S. A. No. 1015 of 1936. 4th December, 1939.

contract could be set aside. An ordinary Civil Court has no power or control over the acts of the Official Receiver.

Virayya v. Official Receiver, Kistna.

Appeal against the decree of the Court of the Subordinate Judge of Bezwada in A. S. No. 67 of 1935 preferred against the decree of the Court of the District Munsif, Bezwada, in O. S. No. 382 of 1933.

P. Satyanarayana Rao and *S. Srinivasachari* for Appellants.

A. Lakshmayya and *S. Venugopala Rao* for Respondents.

The Court delivered the following

JUDGMENT.—This suit has been brought by three creditors to set aside a sale of the insolvents' property on the grounds of fraud and collusion, material irregularity, want of proclamation, and the knocking down of the property for a grossly inadequate sum. Both the Courts below have found that there was no fraud or collusion or material irregularity and have therefore dismissed the suit.

It is argued here that even though the findings of the Courts below as to the absence of fraud and material irregularity are true; yet the insufficiency of consideration is in itself a sufficient ground to warrant the Court in setting aside the sale; for the Insolvency Court is not limited to the same considerations as a Civil Court under O. 21, r. 90, Civil Procedure Code. *M.T.T.K.M.M.N. Venkatachelan Chettiar* v. *M.T.T.K.M.M.S. M.A.R. Murugesan*[1] has been quoted as an authority for this position. It was there held that the Insolvency Court has always full control over the acts of the Official Receiver and can therefore set aside a sale where it is of opinion that it has been unfair or has caused any wrongful loss to the creditor; and that therefore the Court is not circumscribed by the narrow provisions of O. 21, r. 90, Civil Procedure Code. That case however does not bear very much resemblance to the present one, as there was an undoubted hardship there to a particular creditor who had been attending the auctions and who, on account of the incorrect information given by the bailiff, was not actually present when the property was knocked down to the highest bidder. He at once went to the Court and was obviously distressed by his misfortune. It was held that under S. 68 of the Provincial Insolvency Act the Insolvency Court had every right to set aside the sale on such a ground, even

1. (1931) I.L.R. 9 Rang. 231 (F.B.).

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though there was no fraud or material irregularity. In the present case all that can be said for the appellants is that the sum realised was inadequate. Even on that point, the lower appellate Court is not satisfied; but the fact that the appellants have deposited in Court Rs. 2,000 since the filing of this appeal is some indication that they considered the property to be worth very much more than the Rs. 250 for which it was knocked down.

In the present case there is another obstacle in the way of the appellants. They did not put in an application under S. 68 of the Provincial Insolvency Act as the creditor did in *M.T.T. K.M.M.N. Venkatachelan Chettiar* v. *M.T.T.K.M.M.S.M.A.R. Murugesan*[1] and the Court that tried the present suit was not the Insolvency Court at all. An ordinary Civil Court has no power or control over the acts of the Official Receiver. Presumably, a sale can be set aside in a Civil Court only on grounds similar to those on which a contract could be set aside. A mere irregularity or inadequacy of price would be no ground for setting aside a sale in a suit.

In either event, therefore, the appeal fails and is dismissed with costs of the third respondent. The amount deposited in Court by the appellants will be refunded.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE GENTLE.

The Corporation of Madras .. *Plaintiff**

v.

The Secretary of State for India in Council .. *Defendant.*

Corporation of Madras *v.* Secretary of State for India in Council.

Madras Motor Vehicles Taxation Act (III of 1931), S. 2—Steam roller—If "motor vehicles" liable to taxation.

In a suit by the Madras Corporation against the Local Government asking for a declaration that their steam rollers were not liable to taxation under the Madras Motor Vehicles Taxation Act,

Held, the corporation's steam rollers are motor vehicles within the meaning of Madras Motor Vehicles Taxation Act (III of 1931), S. 2 and were liable to taxation.

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1. (1931) I.L.R. 9 Rang. 231 (F.B.).

*C. S. No. 1 of 1937. 8th January, 1940.

Corporation of Madras *v.* Secretary of State for India in Council.

Suit for a declaration that no tax is leviable under the provisions of the Madras Motor Vehicles Taxation Act on the steam road rollers belonging to the Corporation of Madras.

T. T. Vijayaraghavan for *A. Suryanarayanaiya* for Plaintiff.

The Advocate-General (Sir A. Krishnaswamy Aiyar) and *R. Ramamurthi* instructed by *Government Solicitor* for Defendant.

The Court delivered the following

JUDGMENT.—The plaintiff, the Corporation of Madras, was the owner of 21 steam rollers which were used in connection with the discharge of the duty of making, repairing and maintaining roads within the city. Acting through the Commissioner of Police, the defendant (hereinafter called "the local Government") required the plaintiff to pay the sum of Rs. 16,170 as the amount of tax alleged to be leviable upon these steam rollers under the provisions of the Madras Motor Vehicles Taxation Act, 1931 (hereinafter called "the local Act") for the period from 1st April, 1931 to 30th April, 1934. The plaintiff contended that these rollers were not motor vehicles within the meaning of the local Act and that no tax was leviable upon them. Correspondence took place between the plaintiff and the local Government eventuating in 1936 by a letter addressed to the Corporation informing it that if payment of the sum of Rs. 16,170 was not made, the local Government would adjust this sum by an equivalent deduction from the grant payable to the plaintiff during that year. Thereupon, on 30th March, 1936, the plaintiff paid the above sum under protest, *see* Exs. P-1 and P-2. On 14th August, 1936, by Ex. P-4, the plaintiff claimed repayment of the above amount and gave notice of the intention to file the present suit. This demand not having met with compliance, this suit was filed on 14th December, 1936.

The plaintiff claims—

(*a*) a declaration that no tax is leviable upon the steam rollers under the provisions of the local Act;

(*b*) a decree for the sum of Rs. 16,170; and

(*c*) interest upon that sum at the rate of six per cent. per annum from 30th March, 1936, the date when payment was made to the local Government.

The defendant in his written statement alleges that the tax is leviable on the steam rollers under the provisions of the local

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Act and denies that in any event the plaintiff is entitled to recover interest.

No tax upon the plaintiff's steam rollers has been demanded or paid for the period following 30th April, 1934, as under S. 11 (1) (*ii*) of the local Act, the local Government may by notification make an exemption in regard to the tax payable in respect of any motor vehicle or class of motor vehicles and pursuant to this provision, road rollers belonging to the Government or local bodies were exempted from payment of tax after the above date. No oral evidence was given and the facts to which I refer are agreed between the parties.

If a steam roller is a motor vehicle within the meaning of the local Act, the tax was properly leviable, and the plaintiff cannot succeed. On the other hand, if "motor vehicle" under the Act does not include a steam roller, the plaintiff was wrongly chargeable with the tax and is entitled to a decree for the amount paid. There is no dispute in regard to the amount of the claim. It is conceded by the plaintiff that if the tax was payable under the Act, the sum of Rs. 16,170 is the correct amount and the learned Advocate-General on behalf of the defendant conceded that if steam rollers were not taxable, then the above sum is a debt due and recoverable by the plaintiff from the defendant.

The relevant provisions of the local Act are:

"S. 2 (*iii*). 'Motor vehicle' has the same meaning as in the Indian Motor Vehicles Act, 1914.

S. 4 (1). The local Government may, ... direct that a tax shall be levied on every motor vehicle kept or used in the presidency of Madras."

S. 2 of the Indian Motor Vehicles Act, 1914 (hereinafter called "the Imperial Act") provides that a

" 'Motor vehicle' includes a vehicle, carriage or other means of conveyance propelled, or which may be propelled, on a road by electrical or mechanical power either entirely or partially."

Mr. Vijayaraghavan, in the course of his able agrument on behalf of the plaintiff, contended that a steam roller is not included in the definition of "motor vehicle" in the Imperial Act and consequently is excluded from the local Act, and further that even if included in the definition in the Imperial Act, it is excluded from the local Act which is a taxing or revenue statute, the object of which is different to that of the Imperial Act, and its provisions must be construed differently or at least more strictly than other legislation. Except in the respect mentioned

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below, no question arises that a steam roller fulfils the requirements of the definition in S. 2 of the Imperial Act. It is necessary in the first instance to consider whether a steam roller is a "motor vehicle" within the meaning of that statute.

It was contended that the words in the Imperial Act 'vehicle', 'carriage' and 'other means of conveyance' must be read *ejusdem generis* and consequently, a vehicle which is not used or constructed for the purpose of conveying passengers or goods is not a vehicle within the definition, a steam roller being used solely for the purpose of making, repairing and maintaining roads and is not a means of conveyance. In Shortt's Dictionary, a vehicle is defined as "a means of conveyance on wheels or runners used for the carriage of persons or goods". A steam roller has three wheels, a wide one in front and two narrower wheels at the rear (which are usually wider than wheels of vehicles). These wheels are of heavy manufacture and when the roller is employed in road making are used as the rollers. When it moves from place to place and in order to progress, these wheels fulfil the ordinary functions as such, and they are no less wheels because another purpose is fulfilled by them. A steam roller is one inseparable implement with a large superstructure containing its machinery and driver's cab and it travels on a road by means of its wheels. In *Smith & Sons* v. *Pickering*[1], the question was whether a heavy threshing machine and a straw trusser or presser, each travelling on four wheels, were included in S. 17 (1) of the Locomotives Act, 1898, which defines a "wagon" as including "any truck, cart, carriage or other vehicles". Scrutton, J., as he then was, in his judgment pointed out that the words "any truck, cart, carriage or other vehicle" would seem to imply that a wagon must be constructed to carry something and if not so constructed there was support in some provisions of the locomotives Act for the contention that it was not a "wagon", but if it were not regarded as a wagon, other provisions in the Act for the public safety would be inapplicable and at page 331 he said: "I come to the conclusion that it is not necessary to read into the meaning of the word 'wagon' any condition that the particular structure shall be capable of carrying any load other than itself. I see no reason why a heavy superstructure upon wheels should not be

1. (1915) 1 K.B. 326.

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described as a vehicle." If a steam roller were not included in the definition of 'motor vehicle' in S. 2 of the Imperial Act, then the provisions of Ss. 3, 4 and 5 in Part II and Ss. 16 and 17 in Part 5 of the Statute would not apply to it. These sections forbid a person under 18 years of age from driving a motor vehicle, required the driver to stop when directed by a police officer and others specified so to do, make it an offence to drive recklessly, specify the Tribunal by which offences are triable and the punishment. The Legislature could not have intended, for example, to exempt a driver of a steam roller from any penalty, although he was guilty of driving to the danger of the public or refusing to stop when required in the interests of public safety. In *Dennis* v. *Leonard*[1], an "Austin" motor tractor was held to be a vehicle. This is an implement upon which the driver rides and is used for the purpose of towing or pulling. Avory, J., in his judgment at page 96 points out that it was available for the purpose of carrying a person upon it. This must of course be the driver. In *Taylor* v. *Goodwin*[2], a bicycle was held to be a vehicle or carriage within S. 78 of the Highway Act, 1835, which prohibits the furious driving of any carriage, and it would seem that in that case the words 'carriage' and 'vehicle' were considered to be correlative terms. That decision was followed in *Emperor* v. *Kikabhai*[3]. A steam roller is propelled on a road by mechanical power, it conveys the driver, and if he has one, also his assistant. Without the former, it could not travel. With respect, I agree with the opinion of Scrutton, L.J., in *Smith & Sons* v. *Pickering*[4], that a heavy superstructure upon wheels is a vehicle, and it must follow that if it propels itself by mechanical power, it is a motor vehicle. Whether a steam roller is kept or used by a private person, firm or company or by a local authority, there can be no difference as to its nature. I cannot think that it was intended by the Legislature that a private person who is the owner of a steam roller used for roadmaking could send it upon a highway to travel in any town or other part of the country and the driver should not be liable for the consequences of infringements of the provisions in the Act enacted for the purpose of public safety. In my view, a steam roller is a motor vehicle within the meaning of the definition in S. 2 of the Imperial Act.

1. (1929) 141 L.T. 94.
2. (1879) 4 Q.B.D. 228.
3. (1917) I.L.R. 41 Bom. 464.
4. (1915) 1 K.B. 326.

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It is to be noticed that under S. 13 of this Act the Governor in Council by order dated 29th November, 1916, exempted road rollers from the operation of Part III of the Act, which deals with licensing and control of motor vehicles. If a steam roller is not a motor vehicle within the meaning of the Act, then it could not be exempted from its provisions as they would otherwise be inapplicable.

S. 2 (*iii*) of the local Act expressly provides that a 'motor vehicle' has the same meaning as in the Imperial Act. It is contended on behalf of the plaintiff that as the object of the local Act was, as set out in the Preamble, to abolish the levy of taxes on motor vehicles by local bodies and to provide for the levy of a provincial tax, and by S. 10(1), from the proceeds of the tax, the local Government shall pay to each local body such sum as represents the average annual income in tolls or taxes theretofore levied, that the local Act was a revenue legislation and consequently the meaning of 'motor vehicle' is different to that in the Imperial Act, and the legislation being of a revenue nature, the same principles of construction do not apply. I do not agree with this contention. Whilst undoubtedly if a statute purports to impose a tax the intention so to do must be shown by clear and unambiguous language, but the same rules of construction apply to all statutes. In *Attorney-General* v. *Carlton Bank*[1], Lord Russell, C.J., at page 164 said:

"I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, *viz*., to give effect to the intention of the Legislature, as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed. The Court must no doubt ascertain the subject-matter to which the particular tax is by the statute intended to be applied, but when once that is ascertained, it is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardship or of business convenience, or the like." . .

The wording of S. 2 of the local Act is clear and expressive and provides that a motor vehicle within the statute shall have the same meaning as in the Imperial Act. It must follow, in my opinion, that a motor vehicle within the meaning of the Imperial Act must also be a motor vehicle within the contemplation of the local Act. It would seem that the plaintiff Corporation is impressed with the position that prior to the

1. (1899) 2 Q.B. 158.

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passing the local Act the Corporation was the authority which imposed a tax upon the motor vehicles and after it came into force it was unable to accept the new position that its own vehicles were liable to taxation.

I hold that the plaintiff's steam rollers are motor vehicles within the meaning of S. 2 of the local Act and were liable to the taxation imposed upon them by the local Government.

In the light of the conclusion to which I have arrived, it is not necessary to consider at length the arguments which have been addressed to me upon the question of interest upon the amount of the claim. The learned Advocate-General conceded that if the Corporation succeeded in recovering the sum of Rs. 16,170 it would also be entitled to interest upon that amount from 14th August, 1934, the date when the demand was made for repayment. I desire merely to express shortly that in my view the plaintiff is not entitled to interest prior to the above date. The sum claimed is not a debt payable by virtue of any written instrument at a certain time, and interest would therefore commence to accrue from the date when written notice of demand was given as provided by S. 1 of the Interests Act, 1839.

There will be a decree therefore in favour of the defendant and for the costs. (Certificate for Counsel.)

K.S. *Suit dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Pentakota Audinarayana Naidu .. *Petitioner* (Plaintiff)*

v.

The Panchayat Board of Munagapaka represented by its President, Pentakota Ayodhyaramayya Naidu and another .. *Respondents (Defendant and Nil).*

Audinarayana Naidu v. Panchayat Board of Munagapaka.

Contract Act (IX of 1872), S. 72—Taxes and license fees paid under mistaken belief that properties and business were situated within jurisdiction of the Panchayat Board—Claim for refund—Sustainability.

A person who pays taxes and license fees under the mistaken belief that the properties and business were situated within the jurisdiction of the Panchayat Board, does so under a mistake of fact and is entitled to recover them as money had and received under S. 72 of the Contract Act.

* C. R. P. No. 1328 of 1936. 8th December, 1939.

Audi-narayana Naidu *v.* Panchayat Board of Munaga-paka.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Vizagapatam dated 28th July, 1936 and made in S. C. S. No. 181 of 1935.

K. V. Gopalaswami and *G. Balaparameswari Rao* for Petitioner.

Kasturi Seshagiri Rao for Respondents.

The Court delivered the following

JUDGMENT.—This is a revision from the decree of the Subordinate Judge of Vizagapatam acting as a judge of the Court of Small Causes in a suit instituted by one Pentakota Audinarayana Naidu against the Panchayat Board of Munagapaka for the refund of money alleged to have been paid by him for profession and house taxes and in regard to the licensing fee for his rice mill and brick kiln under a mistaken belief that the properties or business in respect of which he had paid the license fees or other taxes were situated within the jurisdiction of the Panchayat Board. The levy of the profession-tax was also questioned on the ground that the notice issued to the plaintiff by the Panchayat Board did not comply with the requirements of law and the demand was therefore illegal. The Subordinate Judge disallowed the plaintiff's claim in regard to the refund of house-tax and license-fee as he held the payments made by the plaintiff to have been voluntary and not under a mistake of fact that arose out of contractual relation, although to use the Sub-Judge's words:

"There was an error in understanding the limits of this jurisdiction owing to ignorance of all parties concerned."

In regard to the profession-tax however he passed a decree for the refund of the tax paid for the year 1934-35 as he found the notice served by the Board on the plaintiff to be illegal and the levy of the same consequently *ultra vires*. The claim for refund of the profession-tax for prior years was not allowed as it was held that the plaintiff had failed to prove that the notices in regard to them were defective and the demand by the Board unjustified. This has led the plaintiff to file the present revision.

Although conceded by the trial Court, learned Counsel on behalf of the respondent contended in this Court that the mistake found to have been committed by the parties was one of law and not that of fact and would not therefore entitle the plaintiff to sue the Board on that basis. Mr. Balaparameswari Rao (learned Counsel for the petitioner) denied this

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and contended on the other hand that S. 72 of the Indian Contract Act made no distinction between mistakes of fact and those of law and alleged that the money paid erroneously was refundable whether it was paid under one kind of mistake or the other. It must be admitted that the words of this section are very general and capable of bearing the interpretation which was attempted to be put upon them; but in view of S. 21 of the Contract Act which provides that a contract is not voidable because it was caused by a mistake as to any law in force in British India, it has been decided in some cases that the mistake, to entitle a party to get the relief, must be one of fact and not of law—see *Appavu Chettiar* v. *South Indian Railway Co., Ltd.*[1], *Raja Rajeswara Sethupathi Avergal* v. *Secretary of State*[2] and *Wolf & Sons* v. *Dadyba, Khimji & Co.*[3] It may be argued that since the term 'coercion' used in S. 72 of the Indian Contract Act has been held by their Lordships of the Privy Council in *Kanhaya Lal* v. *National Bank of India, Ltd.*[4], to have been used in the ordinary sense and the definition in S. 15 held not to control the meaning of that word in this section, the word mistake might similarly be construed in the ordinary sense and should not be controlled by S. 21 of the Act. It is unnecessary, however, for me to consider this question in this case as there is no doubt that the payments were made by the plaintiff to the defendant Board under the mistaken notion that the properties in regard to which those were made were situated within the local jurisdiction of the Board and not beyond it. Whether the plaintiff is entitled to recover them on the ground of failure of consideration or on the basis of an express or at least an implied request of the defendant, there can be no doubt that they were made under a mistake of fact and the plaintiff is entitled to recover them as money had and received by the defendant for the plaintiff's use. The observations of their Lordships of the Privy Council in *Tom Boevey Barrett* v. *African Products, Ltd.*[5] are helpful and may be cited. They observed:

"It follows that in the absence of such proof, the payment made to the appellant in respect of his one thousand shares was, on the interpretation of the facts most favourable to himself, a payment made under a mistake of fact common to himself and the company, namely, that he was a shareholder

1. (1928) 56 M.L.J. 269: A.I.R. 1929 Mad. 177.
2. (1929) 55 M.L.J. 770: I.L.R. 52 Mad. 12: A.I.R. 1929 Mad. 179.
3. (1919) I.L.R. 44 Bom. 631 at 648.
4. (1913) 25 M.L.J. 104: L.R. 40 I.A. 56: I.L.R. 40 Cal. 598 (P.C.).
5. (1928) 29 L.W. 72 (P.C.).

for one thousand shares, when in truth he was not, and money so paid can be recovered as money had and received to the use of the company and this was the form of the action."

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The lower Court's suggestion that even if the mistake under which the money was paid to the Board was one of fact, it was "not one that arose out of any contractual relation" and the money could not therefore be refunded was not justified. It is quite possible to conceive of cases where a payment may have been made by a party under a mistake of fact although there may have been no contractual relation between him and the person to whom the money was paid. The case in *Anrudh Kumar* v. *Lachmi Chand*[1], may be cited as one of the instances in which money paid by mistake was held to be recoverable although there was no contractual relation between the parties to that suit.

Since the main ground on which the plaintiff's claim for refund was disallowed by the lower Court was that the payments made by the plaintiff were voluntary in character, the next question to decide is how far the conclusion arrived at by the lower Court in this connection is correct. Money paid under a mistake of fact would only be recoverable when it is found that it was not paid by the plaintiff with the intention of making a gift or with an idea that the party receiving the money may have the benefit of the same whether the reason which led to the payment was correct or otherwise. Since the remedy under the section is of an equitable nature, it may also not be recoverable if the person who paid the money is found to be estopped from recovering it or even when the receiver's rights in relation to third parties have been prejudiced. But where the position is not altered or the plaintiff has not been guilty of any laches, he would be entitled to recover the money paid by him under a mistake of fact even if he had been careless or negligent and failed to exercise due diligence to enquire into the facts or to remember them. If the money were paid under compulsion of legal process it might have been a different matter, but when it was paid under the mistaken notion of fact that the defendant was entitled to receive this money from the plaintiff, there is no reason why he should not be entitled to recover it after the mistake was discovered. The following statement of law made by Lord

1. (1928) I.L.R. 50 All. 818.

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Reading, C.J., in *Maskell* v. *Horner*[1] is if I may say so with great respect to that high authority correct in so far as it goes. It was to the following effect:—

"If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received."

But this does not mean that the money not paid under compulsion of urgent and pressing necessity is not recoverable. A payment made under a mistake as provided in S. 72, Indian Contract Act, is a case in point. If money is paid under a mistake of fact, it cannot be said to have been voluntary in the sense in which that term was used in law in connection with payments although there may have been no actual compulsion of urgent or pressing necessity. To be voluntary it must have been made by a person of one's own free will; but if it is made under a mistake of fact, how can it be said to have been so? There is no scope here for the *application of decisions* in cases such as in *The Municipal Council, Tuticorin* v. *Ralli Brothers*[2], and in *The Chairman, Municipal Council, Rajahmundry* v. *Nyapathi Subba Rao*[3], where no question in regard to a mistake of fact was raised or considered. Indeed in the first of the above cases Mr. Justice Krishnan Pandalai observed:—

"It has not been contended and very properly that the right to recover can be put upon any ground of mistake because if mistake there was it was a mistake of law and that is not sufficient."

This would show that the learned Judge was not considering cases where the mistake committed was one of fact. If money is paid voluntarily under a mistake of fact, such as the parties were under in this case, namely, in regard to the territorial limits of the Board's jurisdiction, it is recoverable under S. 72 of the Indian Contract Act. That a mistake like this was purely a mistake of fact cannot be doubted. It was so held by Lord Alverstone, C. J., in *Meadows* v. *Grand Junction Water Works Company*[4]. It must therefore be held that a payment under a mistake of fact cannot be regarded as a voluntary payment and the decision of the case against the plaintiff on that ground was erroneous. The decision in *Manilal Lallubhai* v. *Chandulal Tribhovandas*[5] does not decide that a voluntary payment, even *if made by mistake*, cannot be recovered from the party receiving it.

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1. (1915) 3 K.B. 106.
2. (1933) 67 M.L.J. 566.
3. (1937) 1 M.L.J. 496.
4. 21 Times L.R. 538.
5. A.I.R. 1930 Bom. 430.

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The learned Subordinate Judge has however in refusing the reliefs prayed for by the plaintiff based his decision on certain other circumstances. These were firstly that the plaintiff was the President of the Board at the time when he made these payments and he did not care to read the notification limiting the jurisdiction of the Board to certain areas carefully, and secondly that the condition mentioned in *Lloyds Bank, Ltd.* v. *The Administrator-General of Burma*[1], which was to the effect that the mistaken payment must be of such a nature that if such payment were not rectified, the liability would be created against the persons paying, was not complied with. Both these grounds are, in my opinion, incorrect and do not disentitle the plaintiff from recovering the money. As to the first one I have already observed that the plaintiff's ignorance and even forgetfulness would not by themselves disentitle him from claiming a refund unless the plaintiffs can be held to have been estopped or guilty of laches. This is borne out by the very case on which the Subordinate Judge relied in support of the second ground. The learned Judge of the Rangoon High Court expressed himself in the following words:

"The rule governing the recovery of money paid under a mistake of fact seems to be this. That the person paying under a mistake of fact however ignorant he may be and however forgetful he may have been, is entitled to recover such money unless he has at any time waived his claim or has been estopped by reason of conduct by which the payee has altered the position by parting with the money."

Learned Counsel for the respondent has cited *Raghunath Rithkaran* v. *The Imperial Bank of India, Ltd.*[2], in support of his contention that since the plaintiff was negligent in ascertaining the truth, S. 72, Indian Contract Act, would be of no help to him. A reference to the decision would however show that it does not support the proposition for which it has been cited. It was found in that case that the persons who had paid a hundi on presentation were not entitled to recover the money, although they were not the drawees and had paid it under a mistake of fact. In recording his opinion the learned Chief Justice observed as follows:—

"It would seem contrary to principles of common law that in cases of negotiable instruments mistakes of this kind should not be notified within a reasonable time. The fact that the party assumed the liability which was not

1. (1933) I.L.R. 12 Ran. 25.
2. (1925) I.L.R. 50 Bom. 49.

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cast upon him by the document which was presented to him for payment must be taken as a ground for holding that he was bound to notify the mistake within a reasonable time to the holder of the document."

The learned Chief Justice was, it must be remembered, dealing with a Negotiable Instrument in that case and it would be wrong to extend its application to cases where considerations special to that type of cases are not to be taken into account. He held that in the circumstances of that case a duty was cast upon the plaintiffs to inform the Bank within a reasonable time that they had accepted the position under a mistake of fact. The real reason for disallowing the claim was brought out by the other learned Judge when he observed:

"In this case, however the plaintiffs have by their conduct made it impossible to restore the parties to their original position and this fact in my opinion affords a good defence to the suit."

This gives the real clue to the reason why the plaintiffs were held disentitled to recover the money paid by them under a mistake of fact. They were held to have been estopped on account of their silence, and estoppel, even if it is by conduct, is, as already observed, a good defence to a suit of this kind.

The mere fact therefore that the plaintiff was himself the President of the Board during the period when he paid this amount and was ignorant of the limits of its jurisdiction could not, without anything else, justify the Court in disallowing his claim.

As for the second ground reliance was placed by the lower Court in its judgment and by the learned Counsel for the respondent here on an observation in *Lloyds Bank, Ltd.* v. *The Administrator-General of Burma*[1]. It reads as follows:—

" But, it has been laid down that the mistaken payment must be of such a nature that if such payment is not rectified a liability will be created against the person paying. This requirement is present here as any Administrator-General who parts with money belonging to an estate of which he has charge is obviously accountable for the loss thus sustained."

It would not be easy to assent to the proposition if the learned Judge was proposing to lay down a general rule applicable to all cases of payments under mistakes of fact. If the learned Judge was on the other hand, giving an additional ground which was taken by him into consideration in granting the equitable relief, the observation would be innocuous but perhaps unnecessary. One cannot expect to find a circumstance like this in

1. (1933) I.L.R. 12 Rang. 25 at 39.

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every case. In a large number of cases monies paid by persons under mistakes of fact will be found to have belonged to themselves only and no further liability found to have been created if the money is not refunded to them; while in other cases although a liability may be found to come into existence if the money paid by a person is not refunded to him, yet it may not be possible to pass a decree in his favour; I am thus constrained to hold that a condition such as stated by the learned Judge in *Lloyds Bank, Ltd.* v. *The Administrator-General of Burma*[1] cannot be held to be a *sine quo non* for ordering a refund of money paid under a mistake of fact.

There is nothing else which was said at the bar or which would point to the conclusion that the plaintiff had either waived his right to claim or was estopped from claiming this amount. Learned counsel for the respondent seemed to suggest at one time that the money, after it was received by the Board, was utilised towards discharging certain liabilities and could not therefore be recovered but the suggestion was not pressed seriously. It is immaterial if the money paid under a mistake is spent by the recipient in works or things for which he would have paid anyhow whether the money paid under a mistake was received by him or not. It cannot be said in a case like this that the defendant has altered his position on account of the receipt of this payment and this could be no ground to disallow the plaintiff from recovering the money paid by him under a mistaken notion.

So far as the profession tax is concerned, the lower Court had disallowed the refund of payment for prior years only because it found that the plaintiff had not produced any notice like Ex. G in respect of those years. In doing so the Subordinate Judge appears to have overlooked para. 4 of the additional written statement filed by the defendant where it was admitted that the form employed in Ex. G was employed by the Board for all the notices sent during the period when the plaintiff was the President of the Board. This would show that the other notices sent to the plaintiff suffered from the same illegality as from which Ex. G was suffering and the same decree should therefore have been passed in regard to the other payments as well.

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1. (1933) I.L.R. 12 Rang. 25.

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There seems to be no force in the question of limitation so far as the payments other than those relating to profession tax are concerned. The suit was instituted by the plaintiff very shortly after the discovery of the mistake as found by the Court below and since the limitation under Art. 96 started from the date when the mistake became known to the plaintiff, his suit cannot be held to be beyond time. As to the profession tax, the plaintiff would be entitled to a decree for such payments as he had made during the three years prior to suit.

The revision must therefore be accepted and the plaintiff's suit decreed accordingly. In view however of the fact that the plaintiff's conduct had been negligent, I would leave the parties to bear their own costs throughout.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Thadi Chandrayya and others .. *Appellants** (*Appellants*)

v.

Vaitla Seethanna and another .. *Respondents* (*Respondents*).

Thadi Chandrayya v. Vaitla Seethanna.

Limitation Act (IX of 1908), S. 14—Jurisdiction—Court having no jurisdiction—Orders that could be passed—Plaint returned for correction of valuation—Date of re-presentation of plaint was date of suit for purposes of limitation.

A Court which has no jurisdiction to entertain a suit cannot pass orders in the suit beyond directing the plaint to be presented to the proper Court and giving a direction with regard to the costs incurred up to the time of the return of the plaint.

Kannuswami Pillai v. *Jagathambal*, (1918) 35 M.L.J. 27: I.L.R. 41 Mad. 701 and *Govindaraju Naicker* v. *Kassim Sahib*, (1927) 54 M.L.J. 409. followed.

Where a suit was filed on the 30th October, 1929, in the District Munsiff's Court by a person who was a reversioner to the estate of the deceased, whose properties he claimed from alienees, and upon the correctness of the valuation of the properties described in the schedules having been challenged, the District Munsiff directed the return of the plaint on the 6th of August, 1930, on the ground of want of jurisdiction to entertain the suit as then valued. On the question whether for purposes of limitation the suit was a new one on representation of the plaint after the corrections made,

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* L. P. A. No. 99 of 1938. 8th December, 1939.

Thadi Chandrayya *v.* Vaitla Seethanna.

Held, that the date of the re-presentation was the date of the suit for purposes of limitation and in the circumstances of this case the suit was barred.

Case-law reviewed.

Appeal under cl. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Wadsworth dated 14th November, 1938 and passed in S. A. No. 1113 of 1934 preferred to the High Court against the decree of the Court of the Subordinate Judge of Rajahmundry in A.S. No. 117 of 1932 (O. S. No. 249 of 1929, District Munsiff's Court, Ramachandrapur.)

G. Lakshmanna and *G. Chandrasekhara Sastri* for Appellants.

Ch. Raghava Rao and *V. Viyyanna* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The question which arises in this appeal is one of limitation. The suit was filed by the first respondent in the Court of the District Munsif of Ramachandrapur. He was the reversioner to the estate of one Ramanna, which after Ramanna's death devolved upon his daughter Pullamma. The reversion opened on the 3rd July, 1916, when Pullamma died. The first respondent was born on the 1st November, 1908, and therefore attained his majority on 1st November, 1926, which gave him until 1st November, 1929, in which to file the suit. On the 30th October, 1929, he filed a plaint in the Court of the District Munsif and asked for possession of the suit properties from the appellants, who were in possession under the alienations created by Pullamma. In the plaint, the properties were described in two schedules, A and B. The properties in schedule A were valued at Rs. 693 and the mesne profits thereof at Rs. 2,040. The properties in schedule B were valued at Rs. 250. In their written statement the appellants challenged the correctness of the valuation of the properties in B schedule. They contended that there had been gross under valuation. The consequence was that the District Munsif directed the appointment of a Commissioner to estimate the value of the properties. But the plaintiff deliberately abstained from taking out the commission, and from this conduct the District Munsif drew the legitimate inference that the aggregate value of the properties mentioned in the plaint was over Rs, 3,000 and he therefore held that he had no jurisdiction to entertain the suit. On 6th August, 1930, the District Munsif accordingly returned the plaint to the

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first respondent for presentation to the Court of the Subordinate Judge. The first respondent took the plaint away, amended it by striking out his claim for possession of the properties mentioned in B Schedule, and later in the day re-presented it to the District Munsif. On the 11th August, 1930, the District Munsif again returned the plaint to the first respondent as he considered that it was a new suit and which necessitated the filing of a new vakalat. On the 14th August, 1930, the first respondent's pleader re-presented the plaint without filing a fresh vakalat. He contended that the plaint was a continuation of the plaint which was presented on the 30th October, 1929. On the 15th August, 1930, the Court once more returned the plaint to the first respondent, intimating that it must be treated as a fresh suit. On that date the first respondent's pleader re-presented it with an application that the amendment which he had made might be allowed and the plaint approved. He also asked that the plaint should retain its old number. The District Munsif agreed to this course and passed a formal order of the nature indicated.

The only question which arises now is whether the suit must be deemed to have been instituted on the 30th October, 1929, when the original plaint was presented, or on the 6th August, 1930, when the plaint was re-presented after it had been returned by the District Munsif for filing in the proper Court and had been amended by the elimination of Schedule B and the relief claimed in respect of the properties therein mentioned. The District Munsif held that the suit must be deemed to have been filed on the 6th August, 1930, and therefore was barred by the law of limitation. On appeal the Subordinate Judge of Rajahmundry held that the suit was in time, as in his opinion the correct date was 30th October, 1929. On second appeal, Wadsworth, J., agreed with the Subordinate Judge, but gave a certificate for a further appeal under cl. 15 of the Letters Patent. The learned Judge considered that the filing of the amended plaint on the 6th August, 1930, must be deemed to be a continuation of the suit which was filed on the 30th October, 1929 and therefore was in time.

We are of the opinion that the District Munsif was right and that the date of the institution of the suit must be taken to be 6th August, 1930. In *Kannuswami Pillai* v. *Jagathambal*[1],

1. (1918) 35 M.L.J. 27: I.L.R. 41 Mad. 701.

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Sadasiva Aiyar, J., held that when a Court of first instance has decided that a suit is beyond its jurisdiction it has no power to pass any other judicial order, except those which statute expressly empowers it to pass, such as an order returning the plaint for presentation to the proper Court under O. 7, r. 10 of the Code of Civil Procedure or an order awarding costs under S. 35 of the Code. We agree with this statement. A Court which has no jurisdiction cannot pass orders in the suit beyond directing the plaint to be presented to the proper Court and giving a direction with regard to the costs incurred up to the time of the return of the plaint. The opinion of Sadasiva Aiyar, J., was shared by Venkatasubba Rao, J., in *Govindaraju Naicker* v. *Kassim Sahib*[1].

In *Nayinakannu* v. *Madureswara*[2], a Bench of this Court, consisting of Collins, C.J. and Parker, J., had to deal with a case on all fours with the present one. The Court there held that the date of the suit was the date when the plaintiff presented to the Court a plaint which accorded with its jurisdiction. In that case the plaintiffs filed their suit in the Court of the District Munsif for certain offices in a temple and their emoluments. The case was carried to this Court which ordered the plaint to be returned for presentation to the proper Court, namely, the Court of the Subordinate Judge. Instead of presenting the plaint to the Subordinate Judge the plaintiffs abandoned part of their claim so as to bring it within the jurisdiction of the Munsif's Court and re-presented the plaint to the District Munsif's Court. The Bench agreed with the Subordinate Judge that the plaintiffs were not entitled to the benefit of S. 14 of the Limitation Act in the circumstances of the case. The first plaint was returned as the suit as framed was beyond the jurisdiction of the District Munsif's Court. The plaintiffs had then abandoned part of their claim and had sued again in the same Court which they might have done at first. In the circumstances it was held that the suit was barred.

In the course of his judgment Wadsworth, J., referred to *Karumbayira Ponnapundan* v. *Authimoola Ponnapundan*[3]; *Ramachandrayya* v. *Venkataratnam*[4] and *Varada Pillai* v. *Thillai Govindaraja Pillai*[5]. The judgments in these cases are

1. (1927) 54 M.L.J. 409.
2. (1895) 5 M.L.J. 58.
3. (1909) I.L.R. 33 Mad. 262.
4. (1925) 22 L.W. 582.
5. (1930) 59 M.L.J. 953.

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not really in point. In *Karumbayira Ponnapundan* v. *Authimoola Ponnapundan*[1], the plaintiff filed a plaint in the District Munsif's Court and it was returned to him as he had undervalued the properties claimed. If they had been properly valued the value would have exceeded the pecuniary jurisdiction of the Court. After the plaintiff had obtained possession of the plaint he struck out part of the relief claimed and in this way brought the value of the suit within the pecuniary jurisdiction of the District Munsif's Court. He then presented it to the District Munsif who accepted it. On an application for revision Abdur Rahim, J., held that there was nothing illegal in the amendment and that it was competent to the Court to accept the amended plaint. But in this case there was no question of limitation. The Court was not called upon to decide whether the date of the presentation was the date when the plaint was originally filed or when the plaint was re-presented after amendment. Therefore we cannot regard this decision as conflicting with the opinion which I have just expressed. In *Ramachandrayya* v. *Venkataratnam*[2], the plaintiff was allowed to amend his plaint to bring it within the jurisdiction of the District Munsif's Court where he had filed it, instead of having the plaint returned to him for presentation to the Court of the Subordinate Judge. The District Munsif allowed the plaint to be amended, and the question was whether his order was passed without jurisdiction. Odgers, J., held that the District Munsif had jurisdiction. It is unnecessary to consider whether this decision is right. Here again there was no question of limitation. *Varada Pillai* v. *Thillai Govindaraja Pillai*[3] calls for no comment.

On behalf of the respondent a further case has been quoted to us, namely, the decision of Jackson, J., in *Wuppuluru Neelachalam* v. *Narasinga Dass*[4]. There the plaintiff had not paid the proper court-fee and he was ordered to provide the additional stamp required. Instead of doing so he reduced the amount of his claim. By doing this the relief claimed was covered by the stamp. The question was whether the date of the suit should be taken to be the date of the filing of the plaint in the first instance or the date when it was amended and re-presented by the plaintiff. Here the Court had jurisdiction

1. (1909) I.L.R. 33 Mad. 262. 2. (1925) 22 L.W. 582.
3. (1930) 59 M.L.J. 953. 4. (1931) 34 L.W. 252.

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throughout and the only question was whether the plaintiff should pay the additional court-fee or whether he should reduce his claim and thus avoid the necessity of paying additional court-fee. We do not regard this case as having any bearing, but even if it has, it is not binding on us.

We hold that the suit was instituted on the 6th August, 1930, when the Court was presented with the plaint which it had jurisdiction to accept. The hardship which the first respondent is now experiencing is of his own making. He cannot claim the benefit of S. 14 of the Limitation Act, because he deliberately under-valued his relief in the first instance. If he had not done this we should have had no hesitation in granting relief under that section. He has, however, put himself out of Court. We have to decide the case on the technical objection which the appellants have raised. The objection is sound in law and therefore must be accepted.

The appeal will be allowed with costs throughout.

K. C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Vythinatha Padayachi .. *Appellant* (Petitioner)*

v.

Ammalu Ammal and another .. *Respondents (Defendants 4 and 3).*

Vythinatha Padayachi v. Ammalu Ammal.

Limitation Act (IX of 1908), Art. 182 (5)—Execution petition by assignee of mortgage decree under unregistered deed—If in accordance with law, to save limitation.

A person who claimed to be the assignee of the mortgage decree under an unregistered assignment deed applied for execution in 1934. The said application was dismissed for non-payment of batta. He again applied in 1936 for execution after obtaining a fresh assignment deed duly registered and claimed that his application of 1934 saved limitation as an application in accordance with law.

Held, that the application was barred by time as the unregistered document conferred no rights on the applicant and his mere assertion as transferee under O. 21, r. 16 would not give him a right to apply in 1934 and that application was not in accordance with law, to save limitation.

Bando Krishna v. *Narasimha*, (1912) I.L.R, 37 Bom. 42; *Arasappan* v. *Pulugasari*, (1895) 6 M.L.J. 31 and *Rajitagiripathy* v. *Bhavani Sankaram*, (1924) 47 M. L J. 4: I.L.R. 47 Mad. 641, distinguished.

Appeal against the decree of the District Court of South Arcot in A. S. No. 180 of 1936 preferred against the order of

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* A. A. A. O. No. 94 of 1938. 16th January, 1940.

Vythinatha Padayachi v. Ammalu Ammal.

the Court of the District Munsif of Chidambaram dated 1st August, 1936 and made in M. P. No. 557 of 1936 in O. S. No. 1239 of 1926.

S. Jagadisa Aiyar and *G. R. Jagadisan* for Appellant.

T. E. Ramabhadrachariar for Respondents.

The Court delivered the following

JUDGMENT.—The question involved in this appeal is the interpretation of the expression 'in accordance with law' in Art. 182 (5) of the Limitation Act. The appellant is the transferee of the decree in O. S. No. 1239 of 1926 and in February, 1936, applied to execute it. He had previously applied in November, 1934 and the learned District Judge of South Arcot has held that that previous application was not in accordance with law and accordingly dismissed the present application as barred by limitation. The reason given by the learned District Judge is that in 1934 appellant had no right to apply in execution as the deed of transfer which he then filed was unregistered and incapable therefore of effecting any transfer. Against this decision appellant appeals.

The decree in question was a mortgage decree and it is not, of course, contended for the appellant that in 1934 he did in fact possess any legal title to his ownership. The argument in appeal is that the requirements of O. 21, r. 16 are satisfied by a mere 'assignment in writing'—and in support of it I have been referred to a number of rulings.

I may say at once that none of the rulings cited really covers the point at issue. It is true, no doubt, that in order for an application to be in accordance with law it is not necessary for it to be successful, *Adhar Chandra Dass* v. *Lal Mohan Das*[1]. It may be dismissed for a variety of reasons, *Bando Krishna* v. *Narasimha*[2], *Subramania Desika* v. *Rangaswami Chettiar*[3] and *Nandamani Ananga Bhima Deo* v. *Madana Mohana Deo*[4]. But none of these four cases in any way affects the competence of the petitioner to make his application. In *Dayalbhai Ramji* v. *Dayabhai Dulachand*[5], it was held that a transferee's application was in accordance with law even though the Court had not in fact recognised the validity of his transfer, but here again no

1. (1897) I.L.R 24 Cal 778. 2. (1912) I.L.R. 37 Bom. 42.
3. (1934) 68 M.L.J. 261.
4. (1936) 71 M.L.J. 604 : I.L.R. (1937) Mad. 320. 5. A.I.R. 1938 Bom. 309.

Vythinatha Padayachi *v.* Ammalu Ammal.

question arose as to the transferee's status as such. The only cases which appear at first sight to support appellant's contention are *Arasappan* v. *Pulugasari*[1] and *Rajitagiripathy* v. *Bhavani Sankaram*[2]. Both these cases, however, deal with applications accompanied by a valid deed of transfer, in which it was held that the transferee's rights to the decree must give way before the rights of third parties—in *Arasappan* v. *Pulugasari*[1], the sons of the transferee to whom he had previously executed a deed of relinquishment—in *Rajitagiripathy* v. *Bhavani Sankaram*[2], a creditor who had attached the transferred decree. Though these facts would entail the dismissal of any application by a transferee they would not present any legal obstacle to his filing an application.

It seems clear then, that the appellant can find no real assistance in the rulings on which he relies, and I can see no legal principle for holding that the learned District Judge was wrong. The question is really very simple. O 21, r. 16 contemplates transfer of the decree-holder's interest in a decree. In the case of a mortgage decree such a transfer can be effected only by a registered instrument. If an instrument is *not* registered, no matter what its terms may be, it cannot effect a transfer. There is therefore in this case no transfer, and no transferee, and the only person with any title to execute the decree is the original decree-holder. An application filed on the assertion that a transfer has been effected when in fact no transfer has been effected cannot be an application in accordance with law. Appellant's learned advocate was himself prepared to concede that an application by a petitioner who, for example, personates a decree-holder, or presents a forged transfer deed is not in accordance with law and the only reason why this is so must be because he is not competent to apply. In the present case the appellant in 1934 was neither the original decree-holder nor a transferee of his interest in the decree, and therefore the Civil Procedure Code gives him no right to apply and his application is obviously not in accordance with law.

The appeal is dismissed with costs.

Leave refused.

K. S. *Appeal dismissed.*

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1. (1895) 6 M.L.J. 31. 2. (1924) 47 M.L.J. 4: I.L.R. 47 Mad. 641.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

N. Gopalaswamy Rao, License Inspector, Saidapet .. *Petitioner (Complainant)**

v.

Chinna Ponnuswamy Chetty .. *Respondent (Accused).*

Gopalaswamy Rao v Chinna Ponnuswamy Chetty.

Madras Local Boards Act (XIV of 1920), S. 164 (2)—Requisition order for land—Prosecution for failure to comply with—Board, if to establish its title to the land—Duty of Magistrate to decide legality of requisition.

The accused was prosecuted for failure to comply with a requisition under S. 164 (2) of the Madras Local Boards Act and he was acquitted on the ground that the Local Board should establish its title and possession of the land in the Civil Court before invoking the provisions of the Madras Local Boards Act.

Held, the acquittal was erroneous and it is incumbent on the Magistrate to decide the legality or otherwise of the requisition.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Stationary Sub-Magistrate of Poonamallee dated 12—9—1939 and made in C. C. No. 760 of 1939.

M. Raghupathy Reddy for Petitioner.

C. R. Krishna Rao for Respondent.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

The Court made the following

ORDER:—The accused was prosecuted for failure to comply with a requisition under S. 164 clause 2 of the Madras Local Boards Act and he has been acquitted on the ground that the Local Board should establish its title and possession of the land in the Civil Court before invoking the provisions of the Madras Local Boards Act. This is obviously erroneous and it in incumbent on the Magistrate to decide the legality or otherwise of the requisition. The order of acquittal is therefore set aside and there will be a retrial in accordance with law.

K. S. *Order set aside and retrial ordered.*

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* Crl. R. C. No. 1051 of 1939. 22nd February, 1940.
(Crl. R. P. No. 987 of 1939).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

President, Panchayat Board,
Meliyaputti .. *Petitioner** (*Complainant*)
v.
Surappu Veeranna .. *Respondent* (*Accused*).

President, Panchayat Board, Meliyaputti *v.* Surappu Veeranna.

Madras Local Boards Act (XIV of 1920), S. 159 (1)—Encroachment in public street—Claim of Panchayat Board to alleged encroachment—If can be dismissed as of a civil nature.

The accused was prosecuted for failure to remove an encroachment in a public street and was acquitted on the ground that "the question of establishing the Panchayat Board's title or claim to the alleged encroachment is purely of a civil nature. On revision,

Held, the acquittal was erroneous and the Magistrate has to decide the legality or otherwise of the notice under S. 159 (1) of the Madras Local Boards Act.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sheristadar Magistrate of Pathapatnam dated 26-7-1939 and passed in C. C. No. 246 of 1939.

B. Jagannadha Das for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

Respondent not represented.

The Court made the following

ORDER.—The accused was prosecuted for failure to remove an encroachment in a public street and he has been acquitted on the ground that

"the question of establishing the panchayat Board's title or claim to the alleged encroachment is purely of a civil nature."

This is obviously erroneous and the Magistrate has to decide the legality or otherwise of the notice under S. 159 (1) of the Madras Local Boards Act. The order of acquittal is therefore set aside and there will be a retrial in accordance with law.

K. S. *Order set aside and retrial ordered.*

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* Crl. R.C. No. 940 of 1939. 22nd February, 1940.
(Crl. R.P. No. 888 of 1939.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Mantena Kanakaraju .. *Petitioner**
v. (*Appellant.*)
Datla Atchutharamanaraju .. *Respondents*
and another (*Respondents.*)

Madras Agriculturists' Relief Act (IV of 1938), S. 19—'Debt' meaning of.

Kanakaraju *v.* Atchutha-ramanaraju.

The definition of 'debt' specifically includes a decree debt and it is clear that a decree debt is none the less a debt because it does not fall within the category for which special provision is made in S. 19.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to amend the decree in S. A. No. 423 of 1935 on the file of the High Court (preferred against the decree of the Court of the Subordinate Judge of Ellore in A. S. No. 244 of 1933—O. S. No. 786 of 1931 District Munsiff's Court, Tanuku) by scaling down the amount due under the said decree under the provisions of Madras Act IV of 1938.

O. T. G. Nambiar and *W. S. Krishnaswamy Naidu* for Petitioner.

K. Venkatramaraju for Respondents.

The Court made the following

ORDER:—It is contended that the Act does not apply to the scaling down of debts which have ripened into decrees after the commencement of the Act. I can find no support in the Act for this contention. The defnition of "debt" specifically includes a decree debt and it seems to me clear that a decree debt is none the less a debt because it does not fall within the category for which special provision is made in S. 19.

I do not think that the petitioner is entitled to deduct the amount debited for interest at a time when the account was still running with fluctuating balance. When the account closed, there was a definite amount of Rs. 1874-7-0 due and this must be treated as the principal amount and plaintiffs will be entitled to interest thereon at 6¼ per cent from 1st October, 1937 and the decree will be scaled down accordingly.

Leave refused.

K. C. — *Petition allowed.*

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* C. M. P. No. 4014 of 1938 in S. A. No. 423 of 1935. 21st November 1938.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Pendela Pundarikakshudu .. *Appellant** (*Plaintiff*)

v.

Sontineni Kondayya and others .. *Respondents* (*Defendants*).

Pundarikakshudu *v.* Kondayya

Transfer of Property (Amendment) Act (XX of 1929), S. 65-A—Mortgagor leasing property to defraud creditors—Lessee whether entitled to declaration of his title—Lessee whether could redeem the mortgage.

The plaintiff was a simple money creditor of defendants 2 and 3 who executed a mortgage deed in favour of the first defendant which contained a covenant against leasing the property. The first defendant was also an unsecured money creditor of the defendants 2 and 3 and obtained a simple money decree against them. The plaintiff before the decree of the first defendant could be executed got a lease of the property in his own favour for ten years from defendants 2 and 3. He therefore filed an application claiming that the equity of redemption could be sold only subject to the lease in his own favour. That petition having been dismissed the plaintiff filed a suit for declaration to that effect.

Held, (1) that following Pandalai, J, in *Moidunni Haji* v. *Madhavan Nair*, (1932) 65 M.L.J. 826, the lease could not be held to be valid either against the mortgagee or against the other creditors affected by it.

(2) That the plaintiff could not redeem the mortgaged property because if the lease was for an unusual term to defeat the creditors, the defendant would not be bound by it.

Basanta Kumar v. *Adarmani*, (1935) 40 C.W.N. 57, distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Guntur in A.S. No. 150 of 1935, preferred against the decree of the Court of the District Munsif of Guntur in O. S. No. 203 of 1934.

B. V. Ramanarasu for Appellant.

Ch. Raghava Rao for Respondents.

The Court delivered the following

JUDGMENT.—The appellant was a simple money creditor of defendants 2 and 3, who executed a mortgage deed in favour of the first defendant on 20th June, 1923, which contained a covenant against leasing the property. The first defendant was also an unsecured creditor of defendants 2 and 3 and obtained a simple money decree against them. The first defendant attempted to execute his decree in 1932; but by that time the defendants 2 and 3 had filed an Insolvency Petition, and so the Execution Petition was struck off. The Insolvency Petition was subsequently dismissed; and before the

*S. A. No. 900 of 1936. 24th November, 1939.

Pundarikakshudu v. Kondayya.

first defendant filed another Execution Petition against defendants 2 and 3, the plaintiff, in order to satisfy his own decree, had persuaded defendants 2 and 3 to execute a lease of the property for ten years. He then filed E. A. No. 2847 of 1933 in the Execution Petition of the first defendant, claiming that the equity of redemption could be sold only subject to his lease. That petition was dismissed, and the plaintiff thereupon filed the present suit for a declaration to that effect. The lower appellate Court dismissed his suit on the ground that under S. 65-A of the Transfer of Property Act, such a lease would be void in view of the covenant against leasing the property.

It is argued here that S. 65-A would not apply because the mortgage took place before S. 65-A was introduced into the Transfer of Property Act. It is however contended on the other side that although that is true, the lease was actually after S. 65-A was introduced and that S. 65-A therefore applied. On this point I agree with the learned Advocate for the appellant. It is not contended that S. 65-A has any retrospective effect. Its effect was that whereas leases in contravention of a covenant were not void before the amendment, they became void afterwards. In effect, therefore, it added an implied term to the contract, which it could not do to a contract already executed on the date of the amendment.

Before S. 65-A was enacted, some Courts were inclined to apply the strict law of England to mortgages in India also; but the view that finally prevailed was that the mortgagor did have a right to lease and that although it was usual to introduce terms into the mortgage prohibiting the mortgagor from leasing lands, yet that condition was honoured as often in the breach as in the observance. It was accordingly held that a mortgage in breach of a covenant was not void. *Radha Pershad Misser* v. *Monohur Das*[1], *Ali Hasan* v. *Dhirja*[2] and *Niader Singh* v. *Ram Chander*[3] are authorities for that position; and it is not seriously disputed here that within certain limits leases can be granted. The above cases proceeded largely on the interpretation of S. 66 of the Transfer of Property Act, which, by implication, gives the mortgagor a great deal of freedom in the management of his lands and even allows him to commit waste provided that the security is not thereby rendered insufficient.

1. (1880) I.L.R. 6 Cal. 317. 2. (1882) I.L.R. 4 All. 518.
3. A.I.R. 1935 All. 511.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Pendela Pundarikakshudu .. *Appellant** (*Plaintiff*)

v.

Sontineni Kondayya and others .. *Respondents* (*Defendants*).

Pundarikakshudu *v.* Kondayya.

Transfer of Property (Amendment) Act (XX of 1929), S. 65-A—Mortgagor leasing property to defraud creditors—Lease void in the circumstances—Lessee whether entitled to declaration of his title—Lessee whether could redeem the property.

The plaintiff was a simple money creditor of defendants 2 and 3 who executed a mortgage deed in favour of first defendant which contained a covenant against leasing the property. The first defendant was also an unsecured money creditor of the defendants 2 and 3 and obtained a simple money decree against them The plaintiff before the decree of the first defendant could be executed got a lease of the property in his own favour for ten years from defendants 2 and 3. He therefore filed an application claiming that the equity of redemption could be sold only subject to the lease in his own favour. That petition having been dismissed the plaintiff filed a suit for declaration to that effect.

Held, (1) that following Pandalai, J., in *Moidunni Haji* v. *Madhavan Nair*, (1932) 65 M.L.J. 826, the lease could not be held to be valid either against the mortgagee or against the other creditors affected by it.

The lease was void, as it was actually made after S. 65-A of the amended Transfer of Property Act was introduced.

(2) That the plaintiff could not redeem the mortgaged property because if the lease was declared void by a statute then the lessee could acquire no right at all.

Basanta Kumar v. *Adarmani*, (1935) 40 C.W.N. 57, distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Guntur in A.S. No. 150 of 1935, preferred against the decree of the Court of the District Munsif of Guntur in O. S. No. 203 of 1934.

B. V. Ramanarasu for Appellant.

Ch. Raghava Rao for Respondents.

The Court delivered the following

JUDGMENT.—The appellant was a simple money creditor of defendants 2 and 3, who executed a mortgage deed in favour of the first defendant on 20th June, 1923, which contained a covenant against leasing the property. The first defendant was also an unsecured creditor of defendants 2 and 3 and obtained a simple money decree against them. The first defendant attempted to execute his decree in 1932; but by that time the defendants 2 and 3 had filed an Insolvency Petition, and so the Execution Petition was struck off. The Insolvency Petition was subsequently dismissed; and before the

* S. A. No. 900 of 1936. 24th November, 1939.

Pundari-kakshudu v. Kondayya.

first defendant filed another Execution Petition against defendants 2 and 3, the plaintiff, in order to satisfy his own decree, had persuaded defendants 2 and 3 to execute a lease of the property for ten years. He then filed E.A. No. 2847 of 1933 in the Execution Petition of the first defendant, claiming that the equity of redemption could be sold only subject to his lease. That petition was dismissed, and the plaintiff thereupon filed the present suit for a declaration to that effect. The lower appellate Court dismissed his suit on the ground that under S. 65-A of the Transfer of Property Act, such a lease would be void in view of the covenant against leasing the property.

It is argued here that S. 65-A would not apply because the mortgage took place before S. 65-A was introduced into the Transfer of Property Act. It is however contended on the other side that although that is true, the lease was actually after S. 65-A was introduced and that S. 65-A therefore applied. On this point I agree with the learned Advocate for the appellant. It is not contended that S. 65-A has any retrospective effect. Its effect was that whereas leases in contravention of a covenant were not void before the amendment, they became void afterwards. In effect, therefore, it added an implied term to the contract, which it could not do to a contract already executed on the date of the amendment.

Before S. 65-A was enacted, some Courts were inclined to apply the strict law of England to mortgages in India also; but the view that finally prevailed was that the mortgagor did have a right to lease and that although it was usual to introduce terms into the mortgage prohibiting the mortgagor from leasing lands, yet that condition was honoured as often in the breach as in the observance. It was accordingly held that a mortgage in breach of a covenant was not void. *Radha Pershad Misser* v. *Monohur Das*[1], *Ali Hasan* v. *Dhirja*[2] and *Niader Singh* v. *Ram Chander*[3] are authorities for that position; and it is not seriously disputed here that within certain limits leases can be granted. The above cases proceeded largely on the interpretation of S. 66 of the Transfer of Property Act, which, by implication, gives the mortgagor a great deal of freedom in the management of his lands and even allows him to commit waste provided that the security is not thereby rendered insufficient.

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1. (1880) I.L.R. 6 Cal. 317.
2. (1882) I.L.R. 4 All. 518.
3. A.I.R. 1935 All. 511.

It is argued for the appellant that the only test of the validity of a lease is whether it renders the security insufficient and that before a lease can be declared to be invalid, it is necessary for the person seeking to avoid the lease to strictly prove that the security has not been rendered insufficient. In *Niader Singh* v. *Ram Chander*[1], the amount of property leased was very small and it made no appreciable difference to the mortgage security. In the present case, however, the lease, as already observed, was for a period of ten years; which means that even if the property is sold, the purchaser, whether he be the mortgagor or a third party, can have no hope of getting possession for many years to come. Moreover, although the lease was *bona fide* in the sense that it was for consideration and that the appellant was working only to obtain satisfaction of his own decree, there can be no doubt that he had in view the position of his rival creditors and that this lease was brought about for the purpose of defeating the attempt of the first defendant to proceed against the lands for the satisfaction of his own decree. The learned Judges who decided *M. P. M. S. Firm* v. *Ko Pyu*[2], were of opinion that a lease could not operate unless it was made in the ordinary course of management and that if it was one on exceptional terms, it ought not to operate. Pandalai, J., in *Moidunni Haji* v. *Madhavan Nair*[3], reviewed all the cases on this question and came to the conclusion that a lease is void, unless it is one granted in the ordinary course of management. Page, C. J., in *M. P. M. S. Firm* v. *Ko Pyu*[2], thought that S. 65-A was a statement of the then existing law. Following Pandalai, J., in the above case, I hold that the present lease cannot be held to be valid either against the mortgagee or against the other creditors affected by it. The case in *Moidunni Haji* v. *Madhavan Nair*[3] is sought to be distinguished on the ground that there it was an action on the mortgage, whereas it is a mere accident in the present case that the person who is seeking to execute his money decree against the equity of redemption should be the mortgagee. It is no doubt true that we must regard the first defendant not as a mortgagee but as a simple money creditor executing his decree; but if the lease is a void one, he cannot be bound by it.

The remaining question is whether the appellant is entitled to redeem. It was held in *Basanta Kumar* v. *Adarmani*[4] that

1. A.I.R. 1935 All. 511.
2. A.I.R. 1932 Rang. 113.
3. (1932) 65 M.L.J. 826.
4. (1935) 40 C.W.N. 57.

Pundari-kakshudu v. Kondayya.

even where a lease was void, the lessee would be entitled to redeem. With all due respect to the learned Judge who decided that case, it is difficult to see how if a lease is void (as it was in that case because it related to a mortgage after the passing of S. 65-A of the Transfer of Property Act) it could confer any right at all; but that case was decided largely on the authority of *Tarn* v. *Turner*[1]. I do not however consider this last case an authority for that position. That case was naturally one of an English mortgage, in which the ownership of the property passed by law to the mortgagee, leaving the mortgagor no legal title. The mortgagor therefore had no right left in law to deal with the property and a lease would therefore be technically void. It was however pointed out that although in law such was the position, yet equity recognised what was vulgarly known as an 'equity of redemption' which was regarded in equity as an estate. If it was an estate, then the mortgagor could transfer a part of it or the whole of it, and the transferee would therefore have some right in the property which would entitle him to redeem. Such a lease, if it had taken place in India, would not have been void at all. If a lease is declared to be void by a statute, then the lessee can acquire no right at all.

The learned Advocate for the first respondent argues that there was a merger of his mortgage with the equity of redemption which would prevent the lessee from redeeming. He points out that under S. 101 of the Transfer of Property Act, only a subsequent encumbrancer can redeem. At the relevant time, however, there could not have been any such merger; for the suit relates to a time when the mortgagee was seeking to execute his simple money decree by sale of the equity of redemption. It is pointed out by the first respondent that the plaint does not contain a prayer for redemption; and that therefore this Court should not allow the plaintiff to redeem. Both for that reason and on the ground that the lease by the mortgagor for an unusual term to defeat the creditors would not be binding on the first defendant, the appeal is dismissed with costs.

Leave to appeal is refused. *Appeal dismissed.*

K. C.

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1. (1888) L.R. 39 Ch.D. 456.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

M. Venkata Rao .. *Appellant** (*Plaintiff*)

v.

B. Subba Rao and another .. *Respondents* (*Defendants*).

Venkata Rao *v.* Subba Rao.

Presidency Small Cause Courts Act (XV of 1882), Ss. 43 and 47—Sub-lessee leasing in favour of another—Suit by sub-lessee to recover possession—Subsequent suit by the tenant in actual possession denying right in his own lessor to retain possession—Whether suit maintainable.

At the termination of the period of tenancy a tenant who had sub-leased in his turn to another brought proceedings under Chapter VII of Presidency Small Cause Courts Act to recover possession from the sub-lessee. An order was passed under S. 43 of the Act in favour of the tenant as a result of which the sub-tenant filed a suit under S. 47 of the Act. In the meanwhile the defendant in the suit, who was himself a sub-lessee from another in whose favour the lessor, a temple, had leased the suit property originally, having been found to have had possession beyond the period of tenancy in favour of his own lessor, the plaint was sought to be amended by addition of a fresh ground, namely, that the defendant himself had no right to possession as claimed by himself.

Held, that the plaintiff had no right to question the defendant's claim to remain in possession of the property, because until a lessee is ousted by regular proceedings he could not be questioned his possession.

Eviction or something equivalent to it must have taken place before the lessee can deny the title of the lessor.

See *Ramaswami Thevan* v. *Alaga Pillai*, (1924) 79 I C. 881.

Appeal against the decree of the City Civil Court, Madras (Additional) in O. S. No. 1115 of 1939 dated 18th August, 1939.

T. V. Muthukrishna Aiyar and *T. V. Bhaghavat* for Appellant.

M. S. Venkatarama Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The Sri Parthasarathi Temple, Triplicane, leased the suit land to the first defendant, the first defendant sub-leased it to the second defendant, and the second defendant to the plaintiff. At the termination of the period of tenancy, the second defendant brought proceedings under Chapter VII of the Presidency Small Cause Courts Act to recover possession from the plaintiff. An order was passed under S. 43 in the second defendant's favour, and the plaintiff thereupon filed this suit under S. 47. He raised very many pleas and they are set out in the five issues. *Inter alia*, the plaintiff alleged that the

* C. C. C. A. No. 51 of 1939. 11th December, 1939.

Venkata Rao v. Subba Rao.

second defendant agreed to allow the plaintiff to remain in possession for three years which, he said, was the period of the lease of the first defendant from the temple and the second defendant from the first defendant. After the plaint was filed the temple obtained an order under S. 43 of the Presidency Small Cause Courts Act against the first defendant. The plaintiff thereupon obtained permission to amend his plaint and add another ground that the period of tenancy having determined, the second defendant had no right to possession. The plaintiff's suit was dismissed and hence this appeal.

The only point argued in appeal was whether the second defendant could retain possession in view of the fact that the period of her own tenancy had terminated. As already pointed out, one of the plaintiff's contentions was that the period of tenancy was for three years and that he too was entitled to remain in possession for three years. His present contention is therefore inconsistent with one of his main contentions in the amended plaint. It is however said that the matter has now been determined by an order under S. 43 in proceedings between the temple and the first defendant and that that finding is final and binding until the first defendant has had it set aside in a suit in the City Civil Court under S. 47. Such a suit was filed by the first defendant and that suit is still pending.

The ordinary rule is admitted to be that a tenant must deliver possession before he can dispute his landlord's title and that that estoppel ordinarily continues even beyond the term of the tenancy unless the tenant first delivers possession. A number of cases are quoted by Mulla in his 'Transfer of Property Act' as holding that the estoppel continues after termination of the tenancy unless possession is given up. Halsbury, in Vol. XIII at page 506, says:

"But if the tenant came into possession under a lessor, the better opinion would seem to be that he must surrender possession before he disputes the lessor's title; it has, however, been held that it is not necessary that he should actually go out of possession . . . . and that it is sufficient that he should come to a new arrangement with the person who really has the title to hold under him."

The only case quoted by the learned Advocate for the plaintiff in appeal is *Ramaswami Thevan* v. *Alaga Pillai*,[1] which was a case in which the Government had granted tree *patta* to

1. (1924) 79 I.C. 881.

Venkata Rao v. Subba Rao.

a certain person who had sub-leased his rights to a tenant. The Government issued a notice to the *pattadar* which amounted to an eviction and Wallace, J., held, in the words of another case—he quoted *Ram Chandra Chatterjee* v. *Pramatha Nath Chatterjee*[1], 'that there was the equivalent of eviction'. If the tenant has been evicted and he is put into possession by the person who evicts him, then his possession is not referred back to his original lessor and so the estoppel would not operate as it would if he had not been evicted. So it is seen that even in *Ramaswami Thevan* v. *Alaga Pillai*[2], it was considered that eviction or something equivalent to it must have taken place before the lessee can deny the title of the lessor.

The learned Advocate for the plaintiff has relied on the wording of Ss. 43 and 46 of the Presidency Small Cause Courts Act. S. 43 merely lays down the procedure to be adopted by the Court in applications for recovery of possession of property. If the occupant has proved that the tenancy has been determined and that his lessor had no right to possession, then it is sufficient cause, for the purpose of that section, why the Court should not pass an order for possession. The section does not purport to lay down any law modifying the ordinary law with regard to relations between landlord and tenant. S. 46 has no application as far as I can see; for the very question under consideration is whether the second defendant is entitled to possession.

It is further argued that a decision under S. 43 is, in the absence of a decree of a Civil Court varying it, final and that therefore the tenancy must be deemed to have been determined. I have already held that even if that were the case, the second defendant would still be entitled to retain possession until he is ousted by regular proceedings; but in view of the fact that a suit is still pending in the City Civil Court in which the right of the first defendant and therefore of the second defendant to remain in possession is being agitated and in view of the plaintiff's own case that his tenancy and the second defendant's tenancy are for three years, I do not consider that it can be assumed that the tenancy has terminated.

In any event, therefore, whether on the facts or in law, the appeal fails and is dismissed with costs.

K. C. *Appeal dismissed.*

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1. (1921) 63 I.C. 754. 2. (1924) 79 I.C. 881.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

Nallapareddi Annapoornamma .. *Appellant* in Appeal No. 156 and Respondent in Appeal No. 166 of 1936 (Plaintiff)*

v.

Pelleti Veeraraghava Reddi and others .. *Respondents in Appeal No. 156 and Appellants in Appeal No. 166 of 1936 (Defendants).*

Anna-poornamma *v.* Veera-raghava Reddi.

Hindu Law—Widow—Maintenance—Rate of—Widow's private means or stridhana—If to be taken into consideration in fixing—Principles to be observed in fixing—Maintenance suit—Right to costs—Considerations—Evidence—Abstracts from accounts of family—Mode of proof as secondary evidence—Evidence Act, S. 65 (g).

There is no reason why a widow's stridhanam property or private income should be taken into consideration in fixing her rate of maintenance as her right to maintenance is absolute and the duty of persons who are in possession of her husband's estate unqualified and unconditional.

Authorities exhaustively examined by *Abdur Rahman, J.*

Per *Pandrang Row, J.*—In fixing the rate of maintenance the principle to be observed is to bear in mind all the circumstances of the family and also the changed conditions of society and award maintenance in such a way that the widow concerned is able to live in more or less that standard of comfort in which she would have been able to live if her husband had been alive so long as the family can stand it.

So long as the claim to maintenance is genuine and true and the amount claimed is not out of all proportion to the amount that is found to be due, the widow claiming maintenance ought not to be mulcted in costs, when she has to establish her right to maintenance—a right to which she is entitled and which was refused unreasonably and unlawfully by the defendants. She is entitled to the entire costs.

Abstracts from accounts said to have been kept by the family of the parties are relevant technically as "secondary evidence" under clause (*g*) of S. 65 of the Evidence Act and they can be proved only by a person who has examined the accounts and who is skilled in the examination of such accounts.

Appeals against the decree of the Court of the Subordinate Judge of Nellore in O. S. No. 68 of 1931.

P. V. Rajamannar and *K. Subba Rao* for Appellants in Appeal No. 156 of 1936 and for Respondents in Appeal Nos. 166 and 179 of 1936.

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* Appeals Nos. 156, 166, 179 and 191 of 1936. 16th October, 1939.

K. Umamaheswaram for Appellant in Appeal No. 179 of 1936.

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D. R. Krishna Rao for Appellant in Appeal No. 191 of 1936.

P. S. Raghavarma Sastri for Appellants in Appeal Nos. 166 and 179 of 1936 and for Respondent in Appeal Nos. 156 and 191 of 1936.

The Court delivered the following

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JUDGMENTS. *Pandrang Row, J.*—These four connected appeals arise out of two suits for maintenance filed by two widows belonging to the same composite family. Appeals Nos. 156 and 191 are by the plaintiffs in the suits and the other two appeals are by defendants 1 to 7. The suits were for maintenance including arrears of maintenance and also for recovery of jewels or their value and for provision for residence. The claim in both cases was for maintenance and arrears at the rate of Rs. 300 a month and Rs. 5,000 each in lieu of provision for residence. The value of the stridhanam jewels that were claimed was Rs. 6,700 and odd in one case and in the other Rs. 8,700. The suits were tried together and disposed of by one and the same judgment dated 12th October, 1935, the suits having been actually instituted in 1929. The Subordinate Judge of Nellore who decided both these suits gave a decree in each case for Rs. 100 a month as maintenance and arrears of maintenance and Rs. 2,500 as provision for residence and dismissed the claim for jewels or their value in both the suits. Both parties have now appealed in both suits and the contentions of the defendants, who are the appellants in two of the appeals, namely, 166 and 179, are that the maintenance and arrears of maintenance should not be more than Rs. 40 a month and that the provision for residence is excessive and they raise also two comparatively minor points relating to the alleged payment of Rs. 500 at the rate of Rs. 250 to each of the plaintiffs just before the suits were instituted and to the direction by the Court below regarding costs of the suits.

The point raised in the appeals by the plaintiffs, that is, the claimants for maintenance and arrears, is that they should be given at the lowest Rs. 200 a month and that a decree should have been given for jewels or their value to the extent of Rs. 3,000 in the case of Seethamma, that is, the plaintiff in O. S. No. 66 of 1931 and Rs. 4,000 in the case of Annapoorn-

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amma, the plaintiff in O. S. No. 68 of 1931. A point regarding costs has also been raised in these appeals. This direction regarding costs made by the Court below which is objected to by both the sets of appellants will be dealt with after the other points are disposed of.

The main question the discussion of which took up most of the time before us is the one relating to the rate of maintenance. The question has been dealt with in very great detail by the Court below, but unfortunately, in dealing with the point in great detail, the Court below lost sight of one or two important points which had to be decided as a preliminary to an examination of the details. In the first place, the Court below relied almost entirely, or at least primarily, on the abstracts of the accounts said to have been kept by the family of the parties for many years. The abstracts however did not include all the years for which accounts are available. The accounts were available from 1907 onwards. But the abstracts filed at first, namely, Ex. 65, related only to Faslis 1333 to 1343 with a break of 4 or 5 faslis here and there. In short, Ex. 65 seems to betray some signs of having been prepared *ad hoc* for a specific purpose, namely, to show as low a net income as possible. The other abstracts that were filed subsequently, namely, Ex. 66 and certain statements which were filed at a later stage but were not actually marked as exhibits purported to relate to a period of 11 faslis, 1333 to 1343 both inclusive. No doubt if these abstracts had been properly prepared from the family accounts and the latter were reliable they would undoubtedly be the best evidence of the family income, but unfortunately these preliminary conditions have not been satisfied in this case. Let us first see how these abstracts came to be filed into Court. They were filed at a late stage and that too on a direction given by the Court. It is clear from the evidence of the main defendant, the first defendant, that these abstracts were ready even before the written statements were put in. (*See* bottom of page 20 and top of page 21 of the printed record of the evidence). He says:

"My clerks prepared accounts to show the net income from our properties before my written statement was prepared. I told them to do so, and they did so, from the accounts that have been filed in this case."

If the abstracts had been prepared before the written statements were put in there is no reason why they should not have been put in along with the written statement or in any case a definite figure given in the written statement as the family

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income instead of the vague statement that the net income did not exceed Rs. 10,000 a year. On the 12th October, 1934, that is to say, sometime after one of the plaintiffs had been examined, the first defendant was directed by the Court to file a statement showing the gross and net income from different kinds of lands, the first defendant being the family manager. These statements, described as abstracts, were put into Court on the 30th October, 1934, and that is so far as Ex. 65 is concerned, Ex. 66 having been put in much later. The abstract marked as Ex. 65 bears the signature only of the Advocate for the first defendant. This fact has been relied upon by the learned Subordinate Judge as if the affixing of the signature of the lawyer to the abstract gave it any evidentiary value which it did not otherwise possess or would make such an abstract relevant if it otherwise was irrelevant; indeed, the learned Subordinate Judge relied on the signature of the plaintiff's pleader to such an extent that he thought that the abstract in question was entitled to acceptance because of the pleader's signature. He says:

"The plaintiff's pleader had ample opportunities of verifying for himself the accuracy of the figures furnished in Ex. 65 and Ex. 66 and *I am sure he did so.*"

We have not got the same assurance. On the other hand, Mr. Umamaheswaram who appeared for the defendants before us conceded that he could not give us any assurance that the pleader had personally examined all the entries in the account books and satisfied himself personally that the abstract was correct in every particular. It is clear even otherwise judging from probabilities alone that a lawyer, a busy lawyer like Mr. Malekondayya, could not have had time to go through all the entries contained in the numerous account books relating to a period of 10 or 11 years and satisfy himself that each entry was properly classified under the proper head as income and expenditure and that the abstract was correct in every particular. On the other hand, it seems to us as if this method of putting in the abstract was deliberately resorted to with a view to give them a weight or authority which they really did not possess. The first defendant did not sign them though he referred to them in his evidence, and we shall shortly deal with his statement about these abstracts. The gumastah or gumastahs who undoubtedly must have prepared them in the first instance have not been examined about these extracts; in short it may be said that the correctness of these abstracts has not been satisfactorily made

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out. Abstracts of this kind are relevant technically as "secondary evidence" under cl. (*g*) of S. 65 of the Evidence Act; and what that clause provides is that the general result of numerous accounts can be proved by secondary evidence only by a person who has examined the accounts and who is skilled in the examination of such accounts. We are not satisfied that in this case either of these necessary qualifications existed; in other words, there is no clear evidence or satisfactory evidence that any person who gave evidence at the trial examined the accounts himself and gave evidence about it or that he was skilled in the examination of accounts. The only evidence given about these extracts is that of the first defendant who was examined as D. W. 1. He says at page 15 of the documents:

> "I have filed a statement Ex. 65 from my accounts, showing at a glance the net income from my lands for some years. It is a correct extract and true statement. The income from the 10 shrotriams (zamin villages) is given in Ex. 66, another true extract I prepared for 11 years."

It will thus be seen from this passage in his evidence in examination-in-chief that, except as regards Ex. 66, he does not vouch personally for the correctness of the abstract, Ex. 65 in particular, because his statement that Ex. 65 is a correct extract and true statement is a matter of opinion which might be quite reconcilable with the fact that he never examined the accounts personally himself. Indeed, there is an admission at a later stage in his evidence (*vide* page 32) that Ex. 65 series were prepared by his clerk Krishnamurthi. It may be noted that this clerk though present in Court was not examined as a witness. Later on (*vide* page 33) he says that his gumastah prepared Ex. 66 and that he was present at the time. It is thus clear that it was not the first defendant who prepared this abstract himself but that he was merely present when his gumastah prepared it. In these circumstances it is impossible to say that anyone who really examined all the numerous accounts in this case and prepared the abstracts as the result of his examination has been examined as a witness in this case to prove that the abstracts are correct, and certainly it is not pretended that the first defendant is himself competent to prepare correct abstracts of so many accounts as are put forward in the present suits. It is thus apparent that these abstracts have been admitted in evidence in circumstances in which they should not have been admitted; in other words, they have not been properly proved and should not have been relied upon to

such an extent at any rate as the Court below has done. Apart from that we find there are obvious discrepancies which even a cursory glance at the accounts and abstracts themselves would show.

[Then his Lordship deals with the evidence.]

In our opinion these abstracts are not safe guides in the matter of deciding the question as to the probable family income. It is not as if we are without other guides and indeed safer guides. Basing its finding mainly on the abstracts, the Court below was of opinion that the total income was not less than Rs. 20,000 from landed property. We need not go into the evidence at very great length regarding this point because after all it does not make a great deal of difference whether the family income is Rs. 20,000 or Rs. 25,000 or even Rs. 30,000. The income in any case is sufficiently large as not to bring into operation of what one may call the rule prescribing the maximum amount that might be awarded as maintenance. Even on the basis of Rs. 20,000 the share of the deceased husbands of the plaintiffs in these suits would be about Rs. 5,000 a year or Rs. 400 a month and what they now demand is Rs. 200 a month. Unless therefore the income of the family is something less than Rs. 10,000 a year the claim of the plaintiffs' maintenance at Rs. 200 a month could be satisfied without going beyond the maximum fixed by the law as laid down by the highest authorities.

[After commenting on the general evidence his Lordship continues.]

On the whole, therefore, there can be no doubt that the net income of the family after making all allowances for vicissitudes of season and risk of all kinds cannot be less than Rs. 20,000 a year. Indeed, it would not be unreasonable to say that the income would not be less than Rs. 25,000 a year, the family being one which pays about Rs. 10,000 Government assessment in respect of patta lands and Rs. 4,000 jodi in respect of shrotriem villages. A net income of double the Government revenue and jodi is certainly not unreasonable even when prices are lowest.

We do not propose to say much about the details of the question which has been argued at some length, namely, the amount of outstandings and the amount of debts relating to the family.

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[His Lordship reviews here the evidence.]

Bearing all these circumstances in mind, the general conclusion emerges that in cases of this kind, where we are not required to determine, so to say, correctly to the last pie, what the family income is, where a rough estimate is as good as any attempt to arrive at strict accuracy and indeed—where strict accuracy is hardly to be hoped for—namely, the outstandings and the debts can be set off one against the other without doing any serious injustice to either party in this litigation and this conclusion which we mentioned during the hearing of the appeal was not controverted or disputed on either side.

* * * *

Before determining the reasonable amount that can be given in these cases as maintenance, one point remains to be dealt with and that arises in one of these cases only, namely, the claim of Sitamma, the plaintiff in O. S. No. 66. She claimed in a separate suit certain properties as her own and she got a decree in part in her favour in the Court below and that decree is now under appeal. It is argued in these appeals that so far as Sitamma's claim for maintenance is concerned, the income which she derives from the separate property which may be ultimately decreed in her favour should be taken into consideration in determining the maintenance to be allowed to her and that this should be done even in the matter of arrears because, mesne profits, have been claimed by her and have been decreed. We cannot anticipate the ultimate decision in that suit relating to the separate property of Sitamma, and we shall therefore assume for the purpose of these appeals that Sitamma has separate property of her own which brings her an income of about Rs. 50 a month which is what is alleged by the defendants against her. In other words, we proceed on the basis that Sitamma has separate property from which she gets a monthly income of about Rs. 50. Now, the question is whether the possession of this income from separate property is a factor to be taken into account or consideration in the determination of the maintenance to be given to her. On this point, I have had the advantage of seeing my learned brother's judgment which deals with all the relevant cases dealing with this point, and I do not propose to anticipate or repeat any portion of what he is going to say in his judgment. It is enough for me to say that I concur in his views as to the effect

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of the decided cases and in his final conclusion that this income from separate property is not a factor to be taken into account at all, and that the defendants' contention is not supported by any recognised principle of Hindu Law. It is obvious that the recognition of any such contention will introduce greater uncertainty into a field where already there is too much uncertainty. Because while it is no doubt very easy to say in a general way that the income from separate property should be taken into consideration, the extent and mode of taking it into consideration are left vague, and vagueness in a point like this means trouble to the parties who will have to get the question determined by one Court after another. The learned counsel for the defendants, Mr. Umamaheswaram, felt himself compelled to admit that taking into consideration cannot mean that if the widow, for instance, be entitled legitimately to a maintenance allowance of Rs. 100 a month in this case, the rate of maintenance allotted to her should be reduced by Rs. 50 a month, that is, by the amount of the income from her separate property. Obviously he feels that such a position could not possibly be defensible, because, if the income from the widow's separate property had not been only Rs. 50 a month but Rs. 100 a month, the rate of maintenance to which the widow would be entitled would be nil which would be absolutely in the teeth of all principle for the right of a Hindu widow to maintenance from out of the property belonging to her deceased husband is absolute and not subject to any condition that she should be in need of any allowance for maintenance. The co-existence of an absolute right to get maintenance with conditions of this kind is really difficult to postulate, for, what is absolute must be unconditional, and if there are conditions, there cannot be any absolute right. It may be that though in a case of a coparcener's right to a share, the law itself fixes definitely what his share is to be, the amount of the maintenance due to a widow has to be determined by the Court having regard to the facts and circumstances of each case, but that does not make the right other than absolute. The fact that a Court has to determine the exact money value, so to say, of a right which is not determined by the law itself, cannot convert what is an absolute right into a conditional right, that is, a right that can be claimed or that can be said to exist only if certain conditions are satisfied. The only condition—if one may call it a condi-

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tion—to be satisfied in a case like this is that the person who claims maintenance must show that she is the widow of a deceased coparcener and that the family has property on which the claim for maintenance can be fastened. I do not however propose to go further into this point.

We therefore come to the conclusion that there is no necessity for taking into consideration the income that Sitamma would derive from her own separate property.

The point is what is the rate of maintenance that can be regarded as reasonable and proper in the circumstances of these cases. The Court below has given Rs. 100 and the defendants want to reduce it to Rs. 40 while the plaintiffs want to enhance it to Rs. 200. Of course, it is impossible to satisfy both the parties in cases like these, however deeply one may go into the details of the case, or to expect both parties to accept any amount as reasonable, unless they are reasonable enough to compromise and settle the rate between themselves, and not leave it to the Court to decide what the rate should be. In these cases, there is no danger, as we have observed, of exceeding or even approaching near the limit prescribed in cases of this kind; namely, the income of the deceased husband's share which in each of these cases is one-fourth of the entire family property, and which share on any reasonable estimate would fetch an income of not less than Rs. 400 a month. It is obvious that the rate of Rs. 40 is obviously and clearly unreasonably low. There is no legal authority for the shastraic injunction on which extremely low awards of maintenance are sought to be based, namely, that the widow ought to "eat or enjoy moderately," that is live as abstemiously as possible. This moral precept cannot be given legal authority in order to cut down the level of comfort which otherwise a widow, to whom a fortune has been unkind, would be entitled to claim. Whatever might have been the practice in the past, there can be no doubt that the recent tendency has been to be liberal in the grant of maintenance; or to put it perhaps more accurately, not to be illiberal in the grant of maintenance to widows. This is obviously in keeping with the changed times and the changed notions of the people including notions as regards comforts reasonably required for persons belonging to certain classes of society. These changes are reflected in the recent legislation in favour of widows in the shape of the Hindu Women's Rights to Property Act, 1937,

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which as Mr. Raghavachariar, the learned author of "Hindu Law, Principles and Precedents" says, can more appropriately be called the Hindu Widows' Rights to Property Act, because the most marked change introduced in the Hindu law by that Act is the provision in favour of Hindu widows. Though that Act is not applicable to the present cases because the law governing the rights of the parties in these cases is the law as it prevailed before the Act of 1937, nevertheless, the reference to this new legislation is not entirely pointless because that legislation only reflects the change that has unconsciously and slowly crept into Hindu society towards a more liberal treatment of Hindu widows. It is not as if the Legislature suddenly thought it necessary to ameliorate their condition but the Legislature merely gave sanction to a change which had already taken place and that change cannot be ignored by Courts in determining the rates of maintenance. In other words, to put it concretely, the changed notions as to the way in which a widow should live and what pleasures she should be permitted and so on, have to be determined, not in accordance with the old ideals which have more or less ceased to apply or to be applied to actual life, but according to the changed notions that prevail to a greater and greater extent in the present day; as is well-known one tendency observed in the country is the gradual and steady rise in the standard of living, and Hindu widows have been as much subject to this tendency as any other class of people in Hindu society. We therefore think that while the principle to be observed is to bear in mind all the circumstances of the family, courts should also bear in mind the changed conditions of society and award maintenance in such a way that the widow concerned is able to live in more or less that standard of comfort in which she would have been able to live if her husband had been alive, so long as the family can stand it, and there is no difficulty in the way of the family finding the necessary money to maintain the widow in such comfort. It cannot be said that Rs. 100 a month is sufficient for a widow of a wealthy family who is no longer content to stay in her own native village and live the same village existence as widows in the past. It cannot be said that her desire to live in a place like Nellore is unreasonable nor that life in Nellore is not more expensive than life in a village like Kota.

Considering all the circumstances, we are of opinion that the rate of maintenance should be enhanced from Rs. 100 a

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month to Rs. 150 a month. This, however, would apply only to maintenance from the date of the suit and will not apply to the arrears claimed and allowed by the Court below which will remain at the figure Rs. 100 a month. This enhanced rate of maintenance, namely, Rs. 150 a month will, of course, be granted to both the widows; that is to say, the plaintiffs in both the suits will each get maintenance at this rate from the date of her suit.

[Then his Lordship deals with the items of property to be charged for the maintenance and the residence to be provided for the widows and the claim for the jewels.]

The other question of the costs in the lower Court more or less answers itself after the other points have been decided. It is now found that the plaintiffs are entitled to maintenance at least at one half of the rate which was claimed by them in the Court below. In view of the peculiar way in which information was kept back by the first defendant about the status and the property of the family even from the Court itself, it is obvious that the plaintiffs could not be expected to have made a better or nearer estimate of the income of the family than they did. It is impossible to say that a family which, as is now found, pays a Government assessment of Rs. 10,000 in respect of ryotwari lands and Rs. 4,000 for jodi in respect of shrotriem villages could not possibly be getting a net income of Rs. 50,000 a year. It was not an unreasonable estimate to make and it cannot be said that in putting forward that estimate the plaintiffs deliberately exaggerated their claim. After all, even according to the correct state of facts as now found by us the family must have an annual net income of not less than Rs. 25,000 and therefore the shares of the deceased husbands of the plaintiffs would have been about Rs. 500 a month. Even assuming that the total income was only about Rs. 20,000 their shares would have come to Rs. 4,500. They were entitled to claim up to this limit. What exactly is the reasonable amount to be claimed as maintenance is probably more difficult for the claimant-widow to decide than it is for the Court to decide what is the reasonable amount to give, because it is more difficult for the widow to decide against herself than for the Court so to decide. Moreover the Court has to decide only after having all the materials before it. In this case, as in many other similar cases, the plaintiffs are widows with little or no

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exact knowledge of the extent of the property belonging to the family, and have necessarily to depend upon vague information given by people who may know something about it, and they should not and cannot rightly be penalised for acting upon such information as they pick up in this manner. The determination of the actual amount depends on a number of circumstances, and, as these cases themselves show, two Courts can form different opinions as to what is the reasonable rate of maintenance in a given case. The Court below thought Rs. 100 was reasonable and proper whereas we are of the opinion that Rs. 150 is reasonable and proper. This itself shows that it is not reasonable to expect parties who claim maintenance to be meticulously accurate and observe all possible moderation in making their claim. So long as the claim to maintenance is genuine and true and the amount claimed is not out of all proportion to the amount that is found to be due, the widow claiming maintenance ought not to be mulcted in costs, when she has established her right to maintenance, a right to which she is entitled and which was refused unreasonably and unlawfully by the defendants. In these circumstances we are of opinion that the plaintiffs should be given their entire costs including court-fee due on the plaint in the Court below to be paid by the contesting defendants, and the contesting defendants should bear their entire costs in the Court below.

The result is that the appeals by the plaintiffs in the suits are allowed to the extent indicated above, that is to say, the rate of maintenance is raised from Rs. 100 to Rs. 150 a month, but not in the case of arrears claimed. The value of the jewels Rs. 2,200 and Rs. 4,000 are decreed in favour of the plaintiffs, Sitamma and Annapoornamma respectively, in addition to what has been decreed in their favour by the Court below. We have already indicated the change to be made in the decree of the Court below as regards the provision for residence of both the plaintiffs. The question of costs in the Court below has been already dealt with. In the circumstances the appellants in Appeals Nos. 156 and 191 of 1936 are allowed their costs of these appeals to be paid by the contesting respondents who will bear their own costs, the appeals being allowed to the extent indicated above. The other appeals, namely, those by defendants 1 to 7 Appeals Nos. 166 and 179 of 1936, are dismissed with costs.

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Abdur Rahman, J.—I agree with my learned brother and should like to examine the legal point which arises here for consideration with reference to decided cases relied upon by learned Counsel for the parties.

The question to decide is whether the private income which Seethamma has been getting from her Stridhanam (or which has been at times described as peculiar property) should be taken into account in assessing the amount of her maintenance. Learned Counsel for the appellant contends that it should be so. There is some divergence of opinion on the subject both amongst the text book writers and the decisions of the various High Courts. Strange in his Hindu Law, Vol. I at pages 171 and 172 (1830 edition) observes as follows:—

> "Whether, in estimating her stridhana on the occasion, her clothes, ornaments, and the like, are to be taken into account, or only such articles of her property as are productive of income to her, or conducive to her subsistence, does not distinctly appear, though the restricting the account to the latter would seem to be reasonable, considering the object *An opinion, that her maintenance should be independent of her peculiar property, is unsupported.*"

This was not the correct method, in my opinion, of approach to this question. It should not have been presumed that a widow's income from her stridhanam property would have to be taken into consideration in fixing the amount of her maintenance unless some authority was found to support that view. This is particularly so when Sir Thomas Strange has himself in the second volume of his Hindu Law published the opinion of the Nellore Pundit at page 307 when the matter was referred to him, that is, the Pundit for his opinion by the Court. The answer which the Court proposed to give to the matter in issue was suggested in the following words:—

> "On the death of a Brahmin, leaving a widow and two sons, she and they take possession of his estate, subject to her possession of stridhana, in which case she is entitled only to a half share."

The Pundit's comment on the answer was as hereunder:—

> "This opinion is generally correct, but I do not understand either the authority or the reason for restricting the maintenance to the amount of half a share, in case of the existence of stridhana. The division (as it appears to me) *should be made without reference to any property she may hold under this title*, unless it may have been accepted by her. . . . . The widow's claim to maintenance from her husband's estate *is absolute, unlimited by circumstances*; but then, it is only a claim to maintenance and it is not correct to say, that she is entitled to any share or division."

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Having regard to this opinion and without referring to any text or authority which would point to a different conclusion, the presumption raised by Sir Thomas Strange in the first volume against the widow does not seem to be, if I may say so with respect to that author, justifiable. Learned Counsel for the appellant has also not been able to point to any original text in support of his contention and in the absence of any such text, I will have to examine the relevant passages from the works to which reference was made and the cases which were cited at the bar. There are certain passages in Mayne's and Mulla's Hindu Laws at pages 834 and 595 of their latest editions respectively; but having gone through them I do not find any opinion expressed by the learned authors themselves although relying on certain decisions of the various High Courts the proposition has been stated that in calculating the amount of maintenance a widow's stridhanam property must be taken into consideration unless it was of an unproductive character. Sir Dinsha Mulla has however referred to the conflict of opinion existing on the point. Sirkar in his treatise on Hindu Law after referring to the various cases on which reliance was placed by the other authors struck a discordant note at page 621 of the 6th edition, where he observed as follows:—

"But all this is open to the objection that the right to maintenance being a right to property, which the law confers on one person against another, and annexes it to some estate, why should any such extraneous consideration affect it in the manner set forth above, when the law does not say so?"

Since the Hindu Women's Right to Property Act (XVIII of 1937) came into force subsequent to the dates on which the rights to get their maintenance had become vested in Sitamma and Annapoornamma the law as it stood before the Act had come into force will govern the present appeals. It cannot be denied that the widows would be entitled to maintenance as members of their deceased husbands' families. It is a right which devolved on them on account of their marriage with those who owned certain shares during their lives in the joint family property. Their husbands were during their own lives bound to maintain these ladies and the same right would continue to exist as long as they (that is the widows) do so and there is property in which their husbands had shares at the time of their deaths. The question is whether this right can be held to have ceased to exist or said to remain in abeyance if these widows happen to possess some private means of their own. There

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seems to be nothing on principle which would compel us to take the view that this right which came into existence at the time of their marriage and continued to subsist even after the demise of their husbands should disappear permanently or even temporarily, only because they are able to maintain themselves out of their own stridhanam property. A widow's right of maintenance is an absolute right and cannot ordinarily be taken away without a clear provision of Hindu Law. No such provision has been brought to our notice by the learned Counsel for the appellant and in the absence of such a provision or any other cogent reasons it is impossible to ignore that right. Nor are there any decisions of this Court in which the view pressed upon us on behalf of the appellant has been taken. The only Madras case to which our attention was drawn on behalf of the appellant was that of *Lingayya* v. *Kanakammal*[1]. It might be noted here that the head note of this case is rather misleading. The learned Judges do not seem to have decided that a widow's private income was to be taken into account in determining the quantum of maintenance to be paid to her. The facts of the case were that the defendant was found to be in possession of the family property yielding an income of about Rs. 100 per annum. The widow had some private property out of which she could realise something like Rs. 40 to 50 per year. It was contended there that a widow who was able to maintain herself out of other property had no right to claim out of the husband's estate anything for that purpose. This contention was repelled as it was found by the learned Judges to be based on an entirely wrong conception of the right sought to be enforced. In disposing of that contention the learned Judges observed as follows:—

"The wives of the male coparceners in a Hindu family are not entitled to equal shares with the males in the family estate, nor do they take their husband's shares by representation on their death, but in place thereof they are entitled to a portion of their estate for their enjoyment during their lifetime sufficient to maintain them in comfort according to the means of the family. *This is an absolute right due to their membership in the family and does not depend on their necessity arising from their want of other means to support themselves.*"

Two single Bench decisions of this Court were cited on behalf of the respondent in which Anantakrishna Aiyar, J. and Pandalai, J., sitting separately took the view that a widow's

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1. (1913) I.L.R. 38 Mad. 153: 28 M.L.J. 260.

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private means were not to be considered in fixing the amount of her maintenance. Those cases are reported in *Kodandarami Reddi* v. *Chenchammal*[1], and *Sundari Ammal* v. *Venkatarama Sastrigal*[2]. It is true that the question for decision in the latter case was whether the amount of maintenance granted to the widow should not be reduced if her condition had subsequently improved by her own efforts or on account of a gift made to her by one of her relations; but I think that the principle on which that decision was based was that her private income could not be taken into consideration for the purpose of her maintenance. With these decisions I find myself in respectful agreement. Anantakrishna Aiyar, J., had in *Kodandarami Reddi* v. *Chenchammal*[1], after considering the various decisions of different High Courts and what was stated in Mayne's Hindu Law, come to the conclusion that a widow's income from her private property should be, in fixing her maintenance, disregarded. It may not be necessary in this case to decide the question, but the observation in that case by the learned Judge to which I am, as at present advised, unable to give my assent reads as follows:—

"The question will be different when the income from the joint family estate is not enough to maintain all the members depending upon it."

It was unnecessary for Anantakrishna Aiyar, J., to say this in that case. It is unnecessary for us also to decide that question now. I have simply drawn attention to that observation on the ground that our silence may not be construed as tantamount to its approval. In a case where this question arises for decision, it will have to be examined with care.

Out of the cases decided by the High Courts it appears to be more convenient at this stage to examine an old Allahabad decision given in *Shiv Dayee* v. *Doorga Pershad*[3], to which reference has been made in one or two Bombay rulings. The facts of that case were that a suit for the recovery of maintenance was instituted by Shib Dayee against her father-in-law in which it was pleaded by the latter that the plaintiff had taken some cash and movable property belonging to her deceased husband and of the defendant of the value of Rs. 5,000 which sufficed for her maintenance. The trial Court found the proof of the fact that Shib Dayee had taken any jewellery, etc., to the

1. (1929) 59 M.L.J. 531. 2. (1933) 66 M.L.J. 680.
3. (1872) 4 N.W.P.H.C.R. 63.

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value of Rs. 5,000 wanting, but held that she possessed a sum of Rs. 1,000 awarded to her husband in an arbitration and jewels suitable to the position of the family. Holding that the income of the estate purchased by the defendant for his son, that is Shib Dayee's husband along with the interest on the Rs. 1,000 in her possession would be sufficient for her maintenance, the Subordinate Judge dismissed her claim. It will be noticed that no plea was raised on behalf of the defendant that Shib Dayee had no right to get a maintenance on account of her stridhanam property. The sum of Rs. 1,000 which was found to be in her possession was alleged to belong to her husband and if it did, there is no doubt that it had to be taken into consideration in fixing her maintenance. But it appears that some argument was advanced in appeal that she was not entitled to get any maintenance inasmuch as she was found to be in possession of some jewels and other property although unproductive of any income. This was repelled by the learned Judges with the observation:

> "Nor will the fact that a widow has in her possession jewels and other property unproductive of income, deprive her of or diminish her right to maintenance if they constitute her stridhanam although forming part of her husband's estate, they are suitable to the position of the family in society.".

This does not help the appellant, but the next passage appears to be more directly in point and is liable to be construed so as to be more helpful to him. It reads:—

> "If, on the other hand, she has property in her possession productive of income, the amount should be taken into consideration in determining the measure of her allowance for maintenance."

In reading this passage, I do not think that the learned Judges were referring to the widow's stridhanam property at all. In fact the property in Shib Dayee's possession which was productive of interest was the sum of Rs. 1,000 and this observation must necessarily be taken to have referred to that property. It cannot be detached from its context or from the facts of that case and held to be expressing a principle which the learned Judges were not called upon to consider. If it referred to the Rs. 1,000 belonging to her husband, it would not help the appellant. If on the contrary it referred to some property which was not mentioned in that suit, it would be *obiter* and although entitled to respect, yet it would not be, in the absence of any authority, of any great help to us here.

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The first Bombay case which was brought to our notice was that of *Chandrabhaga Bai* v. *Kashinath Vithal*[1] (the page given in some of the references is 323 but the case is the same). It does not help the appellant as it shows that the income accruing from the widow's peculiar property was not taken into account.

The next Bombay decision in *Gokibai* v. *Lakshmidas Khimji*[2] does not help the appellant either. It is true that Mr. Justice Farren did observe in this case that the defendant was bound to show that the widow was possessed of property out of which she could maintain herself; but nothing was said in that judgment which would indicate whether the learned Judge was referring to the joint family property or to the widow's stridhanam property. It is obvious that if the widow could be shown to be in possession of joint family property out of which she could maintain herself she would not be entitled to maintain an action of this nature at all.

The decision in *Dattatraya* v. *Rukhmabai*[3] does not support the contention raised by the appellant. The widow was in that case found to be in possession of funds belonging to her husband's family estate which fund was sufficient to provide her maintenance for five years after the suit had been brought at the rate allowed by the lower Court. In the circumstances it was held that no cause of action had accrued to the plaintiff in 1904 when the suit was instituted. This case does not decide whether the widow had any private income of her own.

The last Bombay case to which reference was made was that of *Gurushiddappa* v. *Parwatemma*[4]. The question in this case was whether the value of the widow's ornaments should be taken into consideration in awarding maintenance to her. The learned Judges who heard the case came to the conclusion that it could not be, but in recording their decision, Broomfield, J., observed:—

"I think it must be taken to be good law that as an ordinary rule stridhan ornaments are not to be taken into account in assessing maintenance. It need not be laid down as an invariable rule. If the widow were in possession of ornaments of great value which she would not ordinarily wear or use, and which she would be likely to dispose of, that might be a different matter. In the present case I see no reason to differ from the view taken by the trial Judge."

1. (1866) 2 Bom.H C.R. 341 or 323.
2. (1890) I.L.R. 14 Bom. 490.
3. (1908) I.L.R. 33 Bom. 50.
4. I.L.R. (1937) Bom. 113.

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No stridhanam property of a productive character or which could be converted into property of that character was involved in that suit and the observation must be regarded to be in the nature of *obiter*.

Wasoodew, J., in writing a concurring judgment observed that a widow's right to claim maintenance out of the husband's estate was *absolute* and rested upon the possession of her husband's property by the person from whom the maintenance was claimed. But he happened to observe:

"It seems to me difficult upon principle to say that the clothes and jewels or ornaments of the widow, whatever their value, should invariably be excluded in the calculation of her maintenance out of her husband's property."

It was not stated by the learned Judge what principle did he have in mind to which reference was made in this sentence. In view of the position that a widow's right to maintenance was conceded to be absolute, that is, not conditional on anything else, why should the fact of her not being in possession of her own private or peculiar property be regarded as a condition before maintenance is granted? If the right is an absolute one, her possession of stridhanam property must be regarded as irrelevant. In spite of this observation the learned Judge agreed in excluding the ornaments from consideration although on the ground that:

"It was not clear upon the record, having regard to the custom of the community to which the widow belonged, that the ornaments in her possession would not all be required to maintain the status of her family."

There is, it is true, a distinction made in some of the text books, which have already been referred to, between the productive and unproductive character of a widow's stridhanam property but this does not seem to be based on any principle, if we bear in mind that it is a right of the widow to be maintained out of her husband's estate or what was once her husband's estate and it is the duty of those on whom her husband's estate has devolved to maintain the widow out of that property in the same degree of comfort to which she was used during her husband's lifetime. It is immaterial if she had any private means of her own or could have them by selling some of the jewellery which would not be required by her after her husband's death. Had the husband remained alive, it would have been his duty to maintain his wife out of his own estate irrespective of her stridhanam or private means and there

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appears to be no reason why the latter should be regarded to be any factor in fixing the maintenance after his death. The right of maintenance was conferred on the widow under the Hindu Law in lieu of her husband's share in the joint family property and cannot be taken away by the fact that she has some property of her own either productive or non-productive of income.

This exhausts all the Bombay cases cited at the bar. The next decision to which reference was made at the bar was that of *Bahuria Saraswati Kuer* v. *Bahuria Sheoratan Kuer*[1]. Wort, J., in delivering his judgment at page 874 observed as follows:—

"The point really is somewhat academic, having come to the conclusion, as I have done, that the plaintiff's claim was based under the general Hindu Law, and that being so, the amount to which she is entitled would be a sum in accordance with her position in life and, as the Privy Council has pointed out, in accordance with the condition of the estate."

No exception could be taken to this statement, but the learned Judge at page 175 happened to observe:

"There is no doubt that under the general Hindu Law a widow claiming maintenance claims it on the basis, as I have said, of her position in life and the position of the estate *having regard also to her means*."

The last words in the preceding sentence do not occur in any of the decisions by their Lordships of the Privy Council. The statement made by the learned Judge himself on the previous page and which has been quoted above does not contain any such qualification. No authority was cited by the learned Judge for the view that a widow's means had to be taken into consideration and apparently the point was not considered by him in its legal aspect. Moreover the private income which the widow was getting in that case by way of an allowance from her brother was disregarded as it was held not to be an income which could be taken into consideration by the Court. This case is certainly no authority for the proposition that in calculating the amount of maintenance her stridhanam must be taken into account.

The last case to which reference was made was an old Calcutta case in *Ramawati Koer* v. *Manjhari Koer*[2]. Relying on *Gokibai* v. *Lakshmidas Khimji*[3], the case which has been already considered by me in an earlier portion of this

1. (1933) I.L.R. 12 Pat. 869. 2. (1906) 4 C.L.J. 74.
3. (1890) I.L.R. 14 Bom. 490.

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judgment, and on the Privy Council decision in *Narayanarao Ramchandra Pant* v. *Ramabai*[1], the learned Judges came to the conclusion that so long as an applicant for maintenance had private means for her own support she could not claim maintenance from her husband's family. I have already tried to show that *Gokibai* v. *Lakshmidas Khimji*[2] does not support that proposition. As for the second case decided by their Lordships of the Judicial Committee, a reference to that case would show that their Lordships did not hold in that case that the right of a widow to maintenance was, "according to the wants and exigencies of the widow." The last words were certainly used by their Lordships of the Judicial Committee but they were used when they were considering a question of limitation and not a question of Hindu law. Referring to the Limitation Act they observed as follows:—

"The language of the Act is not very clear; and by two subsequent statutes of limitation the events from which the time of limitation is to run in the case of maintenance are wholly different. *By common law the right to maintenance is one accruing from time to time according to the wants and exigencies of the widow*; and a statute of Limitation might do much harm if it should force widows to claim their strict rights, and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desirable."

This would show that their Lordships of the Privy Council were trying to express that the cause of action for a widow to maintain her action is of a recurring nature and the period of limitation would only start from time to time according to the wants and exigencies of the widow. They were not considering whether the widow's private means had to be taken into account before a decree for maintenance was passed in her favour. In the absence of any other authority, the decision in *Ramawati Koer* v. *Manjhari Koer*[3] could not be supported. It was expressly dissented from in *Lingayya* v. *Kanakamma*[4].

A review of these cases would show that but for certain *obiter dicta* in some of the judgments it has not been decided in any case, except in the Calcutta case just referred to, that the widow's private means have to be calculated in fixing the amount of her maintenance. On principle as we have already stated above there seems to be no reason why a widow's stridhanam property or private income should be taken into

1. (1879) L.R. 6 I.A. 114: I.L.R. 3 Bom. 415 (P.C.).
2. (1890) I.L.R. 14 Bom. 490.
3. (1906) 4 C.L.J. 74.
4. (1913) 28 M.L.J. 260: I.L.R. 38 Mad. 153.

consideration, if her right to maintenance is absolute and the duty of persons who are in possession of her husband's estate unqualified and unconditional.

K. S. *Appeals by the plaintiffs allowed and appeals by the defendants dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KING AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Muthuvenkatapathy Reddi .. *Appellant** *(Petitioner-2nd Respondent)*

v.

Kuppu Reddi and others .. *Respondents (Petitioners and Respondents 1 and 3 to 5).*

Civil Procedure Code (V of 1908), O. 21, r. 89—Judgment-debtor privately assigning a mortgage to decree-holder and depositing the balance in Court on the re-opening day (the 30th day after sale happening to be a day on which Court was closed)—Application on that day for setting aside the sale—If compliance with O. 21, r. 89—General Clauses Act (X of 1897), S. 10—Applicability

A sale in execution of a decree took place on 2nd December, 1935. On the 2nd January, 1936, the judgment-debtor assigned to the decree-holder a mortgage (which had been executed in their favour) in part satisfaction of the amount due under the decree. A small balance of Rs. 10 was due under the decree. Court closed for the Christmas vacation some days before 20th December, 1935, and did not reopen until the 3rd January, 1936. On that date the judgment-debtor paid into Court Rs. 10 with an application for setting aside the sale. It was contended by the decree-holder that the full amount ought to have been deposited in Court within 30 days of the sale and non-fulfilment of this condition vitiated the application and that the deposit must be in cash only.

Held, any payment or adjustment made by the judgment-debtor which satisfies the decree-holder is a payment within the meaning of O. 21, r. 89. Where the decree-holder was paid most of the amount due to him by assignment of a mortgage out of Court and the small balance was deposited into Court by the judgment-debtors when they made the application for setting aside the sale, it is sufficient compliance with O. 21, r. 89

Per *Krishnaswami Aiyangar, J.*—O. 21, r. 89 of the Code does not contemplate payment in cash and in cash only. Where the 30th day after the sale (within which the amount is to be deposited and the application made for setting aside the sale), was a day on which the Court was closed the balance of amount after adjustment by

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* A. A. O. No. 109 of 1937 and C. R. P. No. 1188 of 1937. 7th February, 1940.

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assignment of a mortgage can be deposited and the application made on the day the Court reopens. What is done by consent of parties as a substitute for the deposit is to be regarded as its equivalent in every respect and judged by the same principles as those applicable to a deposit. S. 10, General Clauses Act, applied and deposit on the reopening date was sufficient.

Appeal against and petition under S. 115 of Act V of 1908 to revise the order of the District Court of South Arcot dated 20th April, 1937 and made in C. M. A. No. 62 of 1936 (C.M. P. No. 162 of 1936 in O. S. No. 334 of 1933, D. M. C., Villupuram).

This appeal and petition coming on for hearing, the Court (*Wadsworth, J.*) made the following

ORDER OF REFERENCE TO A FULL BENCH.*

This appeal raises a question of some importance on which there is a conflict of authority and in my opinion it is desirable that it should be placed before a Bench. The question is whether a judgment-debtor complies with the provisions of O. 21, r. 89, Civil Procedure Code, when the amount which he deposits for payment to the decree-holder is the amount due after giving credit to an adjustment which is not in fact a cash payment to the decree-holder. There is also a further question arising from the fact that the adjustment in question was made after the period of 30 days from the date of the sale but before the date on which the application to set aside the sale was made with reference to the provisions of S. 10 of the General Clauses Act.

The sale was held on 2nd December, 1935, and item 2 was purchased by the present appellant who is a stranger. The amount of the decree as specified in the proclamation was Rs. 3,600 and odd. On 1st January, 1936, when the 30 days period expired the Courts were closed and on the reopening day, 3rd January, 1936, the judgment-debtor preferred an application under O. 21, r. 89 depositing Rs. 247-14-0 to cover the poundage and the 5 per cent. solatium to the purchaser and a sum of Rs. 10 as the balance payable to the decree-holder, after taking credit for an amount adjusted by an arrangement between himself and the decree-holder under which on 2nd January, 1936, he mortgaged property to the decree-holder. It is contended firstly that, assuming that the adjustment in question is a valid receipt for the purpose of r. 89 of O. 21, it cannot be taken into consideration because it was made more than 30 days after the sale. With reference to this contention, it seems to me that the matter is concluded by the words of r. 89 which are "less any amount which may, since the date of

* 13th September, 1939.

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such proclamation of sale, have been received by the decree-holder." The receipt must be after the proclamation and before the application. The application ordinarily is to be made within 30 days but when by the operation of S. 10 of the General Clauses Act it can be made at some later date it appears to me that any payment made after the proclamation and before the application would be a receipt to be taken into consideration under the terms of r. 89.

The more difficult question is whether an adjustment by a private arrangement between the judgment-debtor and the decree-holder whereby credit is given to a particular amount can be deemed to be a receipt of that amount for which credit can be taken in making deposit under r. 89. On this question there is a decision of Beasley, C.J., reported in *Chathurvedula Subbayya* v. *Simha Venkatasubba Reddi*[1], which is against the contention of the appellant. The learned Chief Justice held that a mortgage by the judgment-debtor to the decree-holder in satisfaction of the decree may be a sufficient receipt by the decree-holder for the purpose of r. 89 and that it is not necessary for the judgment-debtor to show that the amount for which he takes credit in making his deposit has been received by the decree-holder in cash. This decision follows a series of Bench decisions of this Court all of which are anterior to the decision of the Privy Council in *Seth Nanhelal* v. *Umrao Singh*[2], to which I shall refer later. The decision of the learned Chief Justice has been followed by the Calcutta High Court in *National Insurance Company, Ltd.* v. *Ezekiel Aaron David*[3] and by implication a similar view may be deduced from a Bench decision in *Jyotish Chandra Ghose* v. *Bireswar Haldar*[4], though the question of the effect of an adjustment as compared with an actual payment was not expressly considered by the Bench. It is however argued that these decisions cannot be reconciled with the decision of the Privy Council in *Seth Nanhelal* v. *Umrao Singh*[2], which must be taken to have destroyed the basis of the decisions upon which the learned Chief Justice relied. Their Lordships of the Privy Council decided that on the rejection of an application under r. 90 the Court is bound under r. 92 to confirm the sale and that the remedy of the judgment-debtor under r. 89 is available only on the deposit being made within the time allowed. They observe that any adjustment between the decree-holder and the judgment-debtor is no ground for setting aside the sale after a third party purchaser has acquired an interest. In the course of their judgment their Lordships expressly disapprove of the decision reported

1. (1935) M.W.N. 937.
2. (1930) 60 M.L.J. 423: L.R. 58 I.A. 50 (P.C.).
3. I.L.R. (1937) 2 Cal. 606.
4. (1935) 61 C.L.J. 313.

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in *Nilkanth* v. *Yeshwant*[1]. This decision was to the effect that when, by an extra-judicial arrangement between the decree-holder and the judgment-debtor, the decree-holder reports that the decree has been satisfied there ceases to be a decree capable of execution and a sale held before this adjustment cannot be confirmed. Their Lordships of the Privy Council do not approve of this decision and hold that under the Code notwithstanding a private arrangement between the decree-holder and the judgment-debtor for the satisfaction of the decree, the sale which has been held must be confirmed unless it is set aside by the procedure laid down in r. 89 and the following rules. It is argued that from this decision it follows that a report of satisfaction under O. 21, r. 2, Civil Procedure Code, made after a sale has been held cannot affect the sale which can only be set aside under the provisions of rr. 89 to 92 and that when the interest of a third party has been created by the sale no adjustment between the decree-holder and the judgment-debtor can operate to the detriment of the third party. There is a decision of Madhavan Nair, J., in *Sorimuthu Pillai* v. *Muthukrishna Pillai*[2], following the Privy Council in which the learned Judge held that the Court is bound to confirm the sale if no application under r. 89 has been made, even if the decree has ceased to subsist by reason of a decision in appeal passed subsequent to the sale. My attention has also been drawn to an *obiter dictum* of the Privy Council in *Oudh Commercial Bank, Ltd., Fyzabad* v. *Thakurain Bind Basni Kuer*[3], to the effect that the only provision for the recording of an adjustment under the Code is that contained in O. 21, r. 2, from which it is argued that O. 21, r. 89 does not contemplate adjustments. And there is an *obiter dictum* of Sulaiman, C J., in *Janki Prasad* v. *Lekhraj*[4], to the effect that there must be an actual payment to the decree-holder to satisfy the requirements of r. 89 and that a mere compromise or an admission of receipt by the decree-holder would not suffice to make the deposit of the balance only by the judgment-debtor a sufficient deposit for the purpose of that rule.

The contention of the appellant on these authorities may briefly be summarised. It is this. The only way in which the Court can recognise an adjustment between the decree-holder and the judgment-debtor is by following the procedure laid down in O. 21, r. 2. This rule has no application when a sale has been held and a stranger has become interested in the property by purchasing that property subject to confirmation. After the sale

1. A.I.R. 1922 Nag. 248.

2. (1932) 65 M.L.J. 253: I.L.R. 56 Mad. 808.

3. (1939) 1 M.L.J. 652 at 658: L.R. 66 I.A. 84: I.L.R. 14 Luck. 192 (P.C.).

4. (1933) I.L.R. 55 All. 697.

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the confirmation does not depend on the continued subsistence of the decree. It follows automatically unless the procedure prescribed in r. 89 is strictly followed by the judgment-debtor and the sale is set aside. Just as the disappearance of the decree by an appellate decision is not a ground for setting aside a sale, so an adjustment of the decree cannot be a ground for setting aside the sale. There must be a strict compliance with the requirements of r. 89, and r. 89 requires the judgment-debtor to deposit the full amount of the decree less any amount which may have been received by the decree-holder before the application is made.

It seems to me that this is a contention which has considerable substance and on which it seems desirable that there should be an authoritative decision. I have not yet heard the respondent and I do not think it desirable to express any definite opinion on the merits of the contention on which I have only heard one side. The matter is, however, to my mind one on which a decision of a Bench is desirable. The appeal will therefore be placed before a Bench.

This appeal came on for hearing in pursuance of the above Order of Reference.

Srinivasaraghavan and *Thyagarajan* for Appellant.

T. R. Srinivasa Aiyangar and *N. T. Raghunathan* for Respondents.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—In 1935 the third respondent in this appeal obtained a decree for Rs. 3,575 against the first and second respondents in the Court of the District Munsif of Villupuram. In execution of the decree the third respondent attached and brought to sale fourteen items of immovable properties belonging to the judgment-debtors. One item of property was purchased at the Court auction by the appellant for the sum of Rs. 264. The total amount realised for the fourteen properties was Rs. 2,217. The sale took place on the 2nd December, 1935. On the 2nd January, 1936, the judgment-debtors assigned to the decree-holder a mortgage which had been executed in their favour. The assignment was in part satisfaction of the amount due under the decree. It is admitted that the value of the mortgage assigned was Rs. 2,207 leaving a balance due under the decree of Rs. 10. The Court closed for the Christmas vacation some days before the 25th December, and did not reopen until the 3rd January, 1936. On that date the judgment-debtor paid into Court Rs. 10, the difference between the amount stated in the sale proclamation and the value of the mortgage assigned to the decree-holder. They also paid into

Court Rs. 110-12-0, being five per cent. of the purchase consideration and Rs. 137-2-0 the amount required for poundage. These payments into Court were accompanied by an application for an order setting aside the sale under the provisions of O. 21, r. 89, of the Code of Civil Procedure. It was contended by the appellant that this application did not lie. In the first place it was said that the full amount ought to have been deposited in Court within thirty days of the sale and the non-fulfilment of this condition vitiated the application. In the second place it was said that in order to comply with the provisions of O. 21, r. 89, the payment by the judgment-debtors to the decree-holder must be in cash, and therefore the assignment of the mortgage did not amount to a payment to the decree-holder within the meaning of the rule. The District Munsif decided against the appellant and on appeal his decision was upheld by the District Judge of South Arcot. The present appeal is from the decree of the District Judge.

O. 21, r. 89 of the Code of Civil Procedure permits a judgment-debtor to apply to the Court to have a sale of immovable property in execution set aside provided certain conditions are fulfilled. He must deposit in Court for payment to the purchaser a sum equal to five per cent. of the purchase money and in addition must deposit for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder. R. 92 requires these deposits to be made within thirty days from the date of sale. If the deposits are made within the required period the Court is bound to set aside the sale. Under the provisions of Art. 166 of the Limitation Act the application for setting aside must be filed within thirty days of the sale. S. 10 of the General Clauses Act states that where, by any Central Act or Regulation made after the commencement of the Act, an act or proceeding is directed or allowed to be done or taken in a Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open. The deposit contemplated by O. 21, r. 89 could not in the present case be

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made within thirty days of the date of the sale because the Court was closed, but it was made on the reopening day and was in time by virtue of this provision of the General Clauses Act.

The second question calls for more consideration, but apart from an *obiter dictum* in an Allahabad decision all the reported cases dealing with this question are against the appellant. As I have indicated, he would have it that the judgment-debtor cannot make payment to the decree-holder within the meaning of cl. (*b*) of r. 89 unless he tenders cash. In other words, the delivery by the judgment-debtor to the decree-holder of moneys worth would not relieve him from the necessity of paying into Court the whole of the decretal amount to entitle him to an order setting aside the sale. This question has been considered by this Court on three occasions. It arose for the first time in *Vedala Lakshminarasimha Charyulu* v. *Pacha Lakshmiamma*[1], which was decided by a Bench composed of by Abdur Rahim and Sundara Aiyar, JJ. It was there held that an agreement with the decree-holder's widow to treat a portion of the decree-debt as discharged in consideration of services rendered by the judgment-debtor to her husband was a valid discharge and the actual receipt of cash was not necessary. In *Anantha Lakshmi Ammal* v. *Sankaran Nair*[2], Benson and Sundara Aiyar, JJ., held that a decree-holder was entitled to waive a portion of the amount due to him and that the waiver operated as payment under r. 89. The decision in *Vedala Lakshminarasimha Charyulu* v. *Pacha Lakshmiamma*[1] was approved of. The question was fully discussed by Beasley, C.J., in *Chathurvedula Subbayya* v. *Simha Venkata Subba Reddi*[3], a case where the facts were similar to the facts in the present case. There a judgment-debtor put in an application under O. 21, r. 89 and deposited the required five per cent. of the purchase money for payment to the auction purchaser, but he made no deposit for payment to the decree-holder because the latter had agreed to accept a mortgage from the judgment-debtor in satisfaction of the amount owing to him under the decree. As in the present case, the auction purchaser objected and contended that the judgment-debtor was required to deposit the amount in cash. This objection was overruled. The learned Chief Justice considered that the gran-

1. (1912) M.W.N. 756. 2. (1913) 24 M.L.J. 205.
3. (1935) M.W.N. 937.

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ting of the mortgage was a payment to the decree-holder within the meaning of the rule and expressed the opinion that a decree-holder could if he chose waive the whole of the decretal amount, in which case the judgment-debtor would not be required to make any deposit in Court. The Calcutta High Court shares the opinion of this Court on this question—see *Jyotish Chandra Ghose* v. *Bireswar Haldar*[1] and *National Insurance Company, Ltd.* v. *Ezekiel Aaron David*[2]. In the judgment in the latter decision reference was made to the decision in *Chathurvedula Subbayya* v. *Simha Venkata Subba Reddi*[3].

Sulaiman, C.J., expressed an opinion to the contrary in *Janki Prasad* v. *Lekhraj*[4], but we have been given to understand that there are no reported cases which support it and the opinion was certainly *obiter* as cash had been paid in that case. After observing that the question whether the amount had been actually received by the decree-holder was one of fact, the learned Chief Justice said that a mere compromise or admission of the decree-holder would not be sufficient. It would be incumbent on the judgment-debtor to satisfy the Court that the amount not deposited in Court had been actually received by the decree-holder within the time fixed. This case was also considered by Beasley, C.J., in *Chathurvedula Subbayya* v. *Simha Venkata Subba Reddi*[3] and I agree that the opinion expressed in *Vedala Lakshminarasimha Charyulu* v. *Pacha Lakshmiamma*[5] and *Anantha Lakshmi Ammal* v. *Sankaran Nair*[6] is preferable.

The learned Advocate for the appellant has placed great reliance on the decision of the Privy Council in *Seth Nanhelal* v. *Umrao Singh*[7], but when the judgment is examined, it is quite clear that it has no application in the present case. The facts in that case were these. The sale in execution took place on the 15th December, 1923. On the 10th May, 1924, the decree-holders accepted a mortgage in satisfaction of the decretal amount. On the 28th June, 1924, some nine months after the sale had taken place, an application was filed by the judgment-debtors to the Court for an order regarding the adjustment. The Judicial Committee held that after a sale in execution had

1. (1935) 39 C.W.N. 829.
2. I.L.R. (1937) 2 Cal. 606.
3. (1935) M.W.N. 937.
4. (1933) I.L.R. 55 All. 697.
5. (1912) M.W.N. 756.
6. (1913) 24 M.L.J. 205.
7. (1930) 60 M.L.J. 423: L.R. 58 I.A. 50 (P.C.).

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taken place no adjustment under the provisions of O. 21, r. 2 could take place because that rule clearly contemplates a stage in the execution proceedings when the matter lies only between the judgment-debtor and the decree-holder, and when no other interests have come into being. Their Lordships did not consider the question whether O. 21, r. 89 requires a payment by the judgment-debtor to the decree-holder to be in cash. That question did not arise and the questions which did arise are not questions which arise in this case.

In my judgment any payment or adjustment made by the judgment-debtor which satisfies the decree-holder is a payment within the meaning of the rule. In this case the decree-holder was paid most of the amount due to him and the balance, Rs. 10, was deposited into Court by the judgment-debtors when they made the application for setting aside the sale. I hold that the application and the payment into Court were in time and it follows that in my opinion the decision of the District Judge is correct. I would dismiss the appeal with costs of respondents 1 and 2.

King, J.

King, J.—I agree.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I concur and have little to add except on one aspect of the argument as presented to us by the learned advocate for the petitioner. His main contention was that payment in cash and in cash only was contemplated by O. 21, r. 89 of the Code. Such a strict construction is not only not warranted by the words used in the rule but is opposed to the view consistently taken by this Court for a long number of years, as pointed out by my Lord. Nor is there any substance in the contention that the decision of the Privy Council in *Seth Nanhelal* v. *Umrao Singh*[1] has rendered that view no longer tenable.

It was urged that whatever the form, the payment or what was its equivalent must have been made or done on or before the 30th day after the sale, and in no event later. The fact that the Court was closed on the last day of the period should, it was said, make no difference as it provides an excuse only when the thing to be done has to be done in Court as for instance when a petition or other proceeding has to be presented or where a

1. (1930) 60 M.L.J. 423: L.R. 58 I.A. 50 (P.C.).

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deposit in cash has to be made in Court. But where an applicant chooses a form of payment, as the assignment of the mortgage in the present case, which can or may be done outside Court, he must in order to qualify himself under the rule, complete the payment in the chosen form before the expiry of the 30 days as he should not be permitted to plead S. 4 of the Limitation Act, in respect of an act for the doing of which, it made no difference whether the Court was closed or open. On this argument though the application under O. 21, r. 89 would be in time if filed on the day the Court reopened, it must necessarily fail as the condition precedent, namely, the deposit had not been made in time. Two reasons were adduced in support of the argument. First it was said that the period within which the deposit is to be made, namely, 30 days is a period fixed not by the Limitation Act which contains the ameliorative provision referred to above, but by r. 92 which cannot be affected by the Limitation Act in the absence of anything in the Code itself to the contrary. Secondly it was urged that S. 10 of the General Clauses Act which contains a provision parallel to S. 4 of the Limitation Act is equally ineffective in a case of this kind. The first contention ignores the fact, that r. 92 fixes a period of 30 days not for the doing of something outside Court equivalent to a deposit into Court, but for the making of a deposit as such into Court. The former method of payment is not governed by the rule, and the period of 30 days fixed by it does not therefore apply to it. The argument would result in the anomaly that there would be two different periods, one fixed by Art. 166 for the application, and the other by r. 92 for the deposit, which may not in all cases synchronise. Such a result could never have been intended by the Legislature. The second argument based on S. 10 of the General Clauses Act is open to the same objections. Further this section is by force of the proviso expressly made inapplicable to any act or proceeding to which the Limitation Act applies.

It appears to me that the true view to take of O. 21, r. 89, Civil Procedure Code, is that what is done by consent of parties as a substitute for the deposit, is to be regarded as its equivalent in every respect and judged by the same principles as those applicable to a deposit. By that consent, what was not in fact a payment in cash is turned into a deposit within the

meaning of the rule, to be acted upon by the Court in all respects as if it were a payment in cash.

K.S. *Appeal dismissed.*

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[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KING AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

J. M. Muhammad Ismail Rowther, Koothanallor, Tanjore District .. *Respondent (Assessee).*

F.B. Commissioner of Income-tax, Madras v. Muhammad Ismail Rowther.

Income-tax Act (XI of 1922), S. 4 (2)—Profits from outside British India—Investment in Mysore bonds—Bonds brought into Madras—Assessment on the face value of bonds—Whether income coming within the meaning of "receipt of income within British India."

An assessee, a resident of Tanjore District in British India, was assessed to income-tax on an income of Rs. 62,599, which included a sum of Rs. 62,006, which the Income-tax Officer held represented a remittance to British India of profits made in Saigon during the period of account. Out of the profits earned by the assessee from his business in Saigon, he remitted during the year of account to the Bank of Mysore at Mysore a sum of Rs. 69,416 and purchased therefrom Mysore Government bonds of the face value of Rs. 60,000. The bonds were in the custody of the Mysore Bank for two months and later they were caused to be sent to the Imperial Bank of India at Madras for safe custody. On security of these bonds the assessee raised a loan of Rs. 33,000.

Held, that the bonds were not bought in Mysore as a device for the purpose of being brought into British India and sold here but were bought to serve as a permanent investment. The bonds constitute capital assets and there is therefore no receipt of income within British India within the meaning of S. 4 (2) of the Income-tax Act. The fact that he has deposited them by way of security does not change their character.

Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan v. *Ahmedabad Advance Mills, Ltd.*, (1940) 1 M.L.J. 137 (P.C.) and *Scottish Widows Fund Life Assurance Co.* v. *Farmer*, 5 Tax Cases 502, applied.

Case stated by the Commissioner of Income-tax, Madras, was as follows:—

1. I have the honour to refer the following case for the decision of the Hon'ble the Judges of the High Court under S. 66 (2) of the Indian Income-tax Act (XI of 1922).

*O. P. No. 255 of 1938. 6th February, 1940.

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2. The petitioner is a resident of Kuthanallur in the Tanjore District within the jurisdiction of the Income-tax Officer, Negapatam circle. He derives income from property in British India and Saigon, and from a partnership business in Saigon of which he is the chief financing partner.

He was assessed for the year 1937-1938 on a total income of Rs. 62,599 which included a sum of Rs. 62,006 being remittance of profits from Saigon to British India during the year of account (1936-37). The petitioner has no objection to the assessment of Rs. 2,006, but objects to the inclusion of the balance of Rs. 60,000 and the present reference arises out of this objection.

3. According to the Saigon accounts of the petitioner's firm, his share of profits for the two years ending 31st March, 1936, amounted to $59,290. Out of this the petitioner remitted $39,834 on three occasions in the year of account to the Bank of Mysore, Mysore, through the Bank of Indo-China, Singapore, and with this money purchased, in November 1936, Mysore Government Bonds of the face value of Rs. 60,000. For these bonds he actually paid Rs. 69,416. The purchases were effected in Mysore through a broker, and the bonds remained for some time in the custody of the Bank of Mysore. In January 1937 they were sent to Madras at the request of the petitioner and deposited with the Imperial Bank of India, Madras, for safe custody. On the security of these bonds the petitioner took an overdraft in the same month from the Kumbakonam branch of the Imperial Bank for the purpose of purchasing property worth Rs. 33,000 at Kumbakonam. On these facts the Income-tax Officer held that the petitioner had received the profits of his Saigon business in British India to the extent of the value of the Mysore Government Bonds brought into British India, and accordingly included a sum of Rs. 60,000 in the assessment. A copy of the Income-tax Officer's order is appended as Exhibit A. The petitioner then appealed to the Assistant Commissioner, Eastern Range, who rejected the appeal for the reasons given in his order, a copy of which is appended as Exhibit B.

4. The petitioner requires me to refer to the High Court the questions of law mentioned in his petition under S. 66 of the Act a copy of which is attached and marked Exhibit C.

5. In my view some of these questions were far too general a character and after discussion with the petitioner's representative he has agreed to modify them as follows:—

(*i*) Whether there was any material before the Assistant Commissioner to justify his conclusion that the Mysore Government Bonds purchased by the petitioner in Mysore did not represent his capital?

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(*ii*) If the answer to the above question is in the affirmative whether under a proper construction of S. 4 (2) of the Act a sum of Rs. 60,000 representing the face value of the bonds was liable to be assessed or only the amount of Rs. 33,000 which the petitioner had obtained on an overdraft against the security of the bonds,

and I accordingly refer these two questions for the decision of their Lordships.

(6) (*i*) It is common ground that Mysore bonds of the face value of Rs. 60,000 were purchased out of the Saigon profits and that these bonds were sent into British India from Mysore during the year of account and held in the custody of the Imperial Bank of India, Madras, on behalf of the petitioner. The petitioner's contention is that the profits became capitalised when they were invested in Mysore Government Bonds, and that by bringing the bonds into British India he did not bring in profits but capital. He quotes the decision of the Bombay High Court in the case of *Ahmedabad Advance Mills, Ltd,*[1] and the English case of the *Scottish Widow's Fund Life Assurance Society* v. *Farmer*[2], which incidentally is obsolete owing to subsequent legislation in England. His main argument is that so long as the foreign profits remain in the form of bonds, they have the character of 'capital' and can be taxed, if at all, only when the bonds are sold and converted into cash. He stresses the point that he is at present deriving more interest from the bonds than what he has to pay on the overdraft to the Bank. In my opinion the decision in *The Ahmedabad Advance Mills, Ltd.*[1] (against which an appeal is being made to the Privy Council) has nothing to do with the facts of the present case. In this case out of profits made abroad the petitioner purchased bonds in Mysore. These bonds represent profits and the mere conversion of what was really a bank balance representing profits into bonds does not alter the character of the profit. A profit can be represented by assets in any form and in whatever form those assets are brought into British India they still represent profits. The bonds therefore when purchased in Mysore did not represent the petitioner's capital but represented his profits in a different form, that is instead of a bank balance they were bonds and there was material before the Assistant Commissioner to justify his finding on this point. This question should therefore be answered in the affirmative.

(*ii*) It is settled law that money can be received in British India in more ways than one and in this case it is clear that what has been received in British India are profits in the form of bonds.

1. (1937) 6 I.T. Rep. 31: I.L.R. (1938) Bom. 171.
2. (1909) 5 Tax Cases 502.

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In the case of *A. R. P. L. S. P. Manickam Chettiar*[1], this Hon'ble Court held that the transactions in that case amounted to remittances into British India of money or money's worth. I submit that in the present case the transaction is even more clearly the receipt of money's worth in British India and that the petitioner's tortuous method of bringing his profits into British India, *via* Mysore cannot succeed. I am unable, I confess, to appreciate the distinction which the petitioner wishes to draw between the total value of the bonds and the amount of Rs. 33,000 which he obtained as an overdraft. In my view the question of the overdraft given by the Bank against the bonds is quite irrelevant except to the extent that it proves that something of value in excess of Rs. 33,000 was brought into British India as collateral security. I consider therefore that the answer to this question should be that the petitioner is liable to be assessed at the very least on the sum of Rs. 60,000, that is, the face value of the bonds. I say "at the very least" as in my opinion he should have been assessed not on the face value of the bonds (for which he paid Rs. 69,416) but on the actual market value of the bonds on the date on which they were brought into British India which was Rs. 68,983.

Reference to this Court by the Commissioner of Income-tax, Madras, under S. 66 (2) of the Indian Income-tax Act XI of 1922 for decision on the following questions:

"(*i*) Whether there was any material before the Assistant Commissioner to justify his conclusion that the Mysore Government bonds purchased by the petitioner in Mysore did not represent his capital?

(*ii*) If the answer to the above question is in the affirmative whether under a proper construction of S. 4 (2) of the Act a sum of Rs. 60,000 representing the face value of the bonds was liable to be assessed or only the amount of Rs. 33,000 which the petitioner had obtained on an overdraft against the security of the bonds."

K. V. Sesha Aiyangar for Petitioner.

K. Bhashyam and *T. R. Srinivasan* for Respondent.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—The assessee is a resident of Koothanalloor, in the Tanjore District in the Madras Presidency. He derives income from immovable properties which he possesses in British India and in Saigon in Indo-China, and from a business which he carries on in partnership in Saigon. For the year 1937-38 he was assessed to income-tax in this country on a total income of Rs. 62,599. This amount included a sum of Rs. 62,006, which the Income-tax Officer held represented a

1. (1936) 5 I.T. Rep. 534.

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remittance to British India of profits made in Saigon during the year of account. The assessee objected to the assessment. He contended that he had been over-assessed to the extent of Rs. 60,000. For the two years which ended with 31st March, 1936, the assessee's profits in Saigon amounted to $59,290. Of this he remitted $39,834 during the year of account to the Bank of Mysore, Mysore City, and there purchased Mysore Government bonds of the face value of Rs. 60,000. The actual price paid for these bonds was Rs. 69,416. The whole of this amount was paid out of the moneys remitted from Saigon. For two months the bonds remained in the custody of the Bank of Mysore, but in January 1937 the assessee caused them to be sent to the Madras branch of the Imperial Bank of India for safe custody. Subsequently, he arranged with the Kumbakonam branch of the Imperial Bank of India for an overdraft for the purpose of purchasing immovable property worth Rs. 33,000. The security consisted of the Mysore Government bonds which the assessee had purchased out of the remittance from Saigon. The assessee says that the Income-tax authorities have no right to treat the bonds as representing a remittance of profits, and at his request the Commissioner of Income-tax has referred to this Court for decision the following questions of law:

"(*i*) Whether there was any material before the Assistant Commissioner to justify his conclusion that that the Mysore Government bonds purchased by the petitioner in Mysore did not represent his capital?

(*ii*) If the answer to the above question is in the affirmative whether under a proper construction of S. 4 (2) of the Act a sum of Rs. 60,000 representing the face value of the bonds was liable to be assessed or only the amount of Rs. 33,000 which the petitioner had obtained on an overdraft against the security of the bonds."

If the first question is answered in favour of the assessee the second question does not arise.

The reference was made by the Commissioner on the 4th September, 1938, but at the suggestion of the learned Counsel engaged in the case the hearing was postponed until the Privy Council had decided an appeal which was then pending from the judgment of the Bombay High Court in the case of the *Commissioner of Income-tax, Bombay Presidency* v. *The Ahmedabad Advance Mills, Ltd., of Bombay*[1]. The Judicial

1. I.L.R. (1938) Bom. 171.

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Committee has now delivered judgment in that case.* The judgment does not decide the question which arises for decision in the present case, but there are observations in it which are helpful to the Court. In the case referred to, the assessee was a limited company and had lying in London a sum of Rs. 18,000 which it had received as income on certain sterling bonds of the Government of India, the interest on which was paid in London. The assessee Company invested this income in the purchase of stores and machinery which it shipped to Bombay and utilised in its business in British India. The question was whether the stores and machinery could be regarded as income brought into British India within the meaning of S. 4 (2) of the Indian Income-tax Act, 1922 and therefore taxable. The Bombay High Court held that the bringing of stores and machinery into British India did not represent a remittance of profits made abroad. The purchase had resulted in the capitalisation of the profits received in England. It was pointed out by Beaumont, C.J., that foreign income might be received in sterling or francs or dollars, and might be brought into British India in the form of rupees, or be remitted to India by means of a banker's draft and in this connection referred to the judgment of Lord Brampton in *Gresham Life Assurance Society* v. *Bishop*[1], where it was said that income might be received "*in specie* or in any form known to the commercial world for the transmission of money from one country or place to another", the implication being that it could not be received in any other form. The learned Chief Justice went on to say that in order to attract income-tax in India what is brought into this country must be income, profits and gains, and if the assessee has converted income received abroad into capital, and then brings that capital to India, he is not bringing into India income, profits or gains. It was not suggested in that case that the stores and machinery were brought into India for the purpose of being sold and the proceeds applied as income, but it was apprehended that if an assessee converted foreign income into some form of capital, for instance, bonds, and having realised the assets in this country had applied the proceeds as income the Court would hold that what had been brought into this country was in fact income and not capital.

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* Since reported in (1940) 1 M.L.J. 137 (P.C.).

1. (1902) A.C. 287.

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The decision of the Bombay High Court was approved by the Judicial Committee and in delivering the judgment of the Board, Lord Romer quoted the remarks of Lord Lindley in *Gresham Life Assurance Society* v. *Bishop*[1], where he said:

"A sum of money may be received in more ways than one, for example, by the transfer of a coin or a negotiable instrument or other document which represents and produces coin, and is treated as such by business men."

The Privy Council, however, refrained from deciding the question whether the purchase of bonds out of profits made abroad would represent a remittance of profits if the bonds were brought into British India and realised as that question did not arise in the case. It was left to be decided if and when the occasion arose. It arises in this case, but on facts very different from those contemplated in the judgment of Beaumont, C.J.

In the present case the bonds were not bought in Mysore for the purpose of being brought into British India and sold here. On the facts stated in the reference it must be taken that the assessee bought them as a permanent investment. He has still got the bonds, and the fact that he has deposited them by way of security for an overdraft does not change their character. It is conceded on behalf of the Income-tax authorities, and rightly conceded, that where a person invests profits in bonds and no question of remittance of profits arises the bonds will constitute capital assets. In my opinion, the investment of the moneys remitted to Mysore by the assessee must in the light of the surrounding circumstances be held to be a conversion of profits into capital, and nothing more.

The decision in the case of the *Scottish Widows' Fund Life Assurance* v. *Farmer*[2] is also helpful here. Lord Johnston, the Lord President there observed:—

"Either the money itself must be brought over *in specie*, or the money must be sent in the form which, according to the ordinary usages of commerce, is one of the known forms of remittance."

Later on, the Lord President went on to say:

"Although the bearer bonds are marketable securities, that is, of course, surely neither here nor there, because in one sense everything is a marketable security at a price. The fact that a bearer bond is a marketable security and easily marketable, and therefore a negotiable instrument, does not seem to me to touch for one moment the question whether it is an ordinary form of remittance. Nobody ever heard of remitting money by means of a bearer

1. (1902) A.C. 287.
2. (1909) 5 Tax Cases 502.

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bond, for this very good reason; you could not possibly remit money by it and know exactly what you are doing, because the price of bearer bonds fluctuates in the market every day, and a bond might start from New York at one price and arrive in London at a perfectly different one. It therefore is not at all in the same category with that way which modern arrangements have perfected, by which you may send money from one country to another in the form of hard cash consigned in a package or box, or, by means of a bank draft, which is, of course, simply a transaction of debtor and creditor between different persons on different sides of the Atlantic."

There is also the further factor that before securities can be bought or sold a commission is payable to a broker. In that case part of the revenue of a mutual life assurance society, carrying on business in the United Kingdom only, consisted of interest on foreign bearer bonds and other foreign securities. The securities were kept at the society's head office and the interest was included in its revenue account. When the interest fell due on the foreign bonds the coupons were sent from the society's head office to the agents abroad for the purpose of the collection of interest and out of the interest further foreign securities were brought. The further purchases were also sent to the United Kingdom. The question was whether the receipt of the foreign bonds at the head office represented a receipt of income within the United Kingdom. It was held that it did not.

The Court is not here concerned with the case where a person, in order to avoid the payment of Income-tax converts his foreign profits into foreign securities and then proceeds to realize them in British India. There is no suggestion of a device and the statements quoted from the judgments in *Gresham Life Assurance Society* v. *Bishop*[1] and *Scottish Widows' Fund Life Assurance Society* v. *Farmer*[2] have direct application. For the reasons indicated, I would answer the first question in the negative. In these circumstances no answer need be given to the second question.

The assessee having succeeded is entitled to his costs, Rs. 250, and to the return of his deposit of Rs. 100.

King, J.

King, J.:—I agree.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.:—I agree.

S. V. V. *Question one answered in the negative.*

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1. (1902) A.C. 287.
2. (1909) 5 Tax Cases 502.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Sevadappa Goundar .. *Appellant** (*Respondent*)

v.

K. V. Narayanaswami Aiyar, Special Receiver in I. P. Nos. 17 and 21 of 1930 on the file of the Sub-Court, Coimbatore. *Respondent* (*Petitioner*).

Sevadappa Goundar *v.* Narayanaswami Aiyar.

Res judicata—*Mortgage suit—During pendency insolvency of mortgagor—Petition of Official Receiver to set aside mortgage under S. 4, Provincial Insolvency Act (V of 1920)—Final decision of the Civil Court barring disposal of issue in Insolvency Court.*

A mortgagee brought a suit upon his mortgage, but during the pendency of the suit the mortgagor's estate having vested in the Official Receiver in insolvency, the Official Receiver filed a petition in the Insolvency Court under Ss. 4 and 53 of the Provincial Insolvency Act to set aside the mortgage. The suit of the mortgagee was decreed and the petition of the Official Receiver dismissed by the Subordinate Judge The Official Receiver only filed an appeal against the order dismissing his petition and filed no appeal against judgment in the mortgagee's suit. In appeal the District Judge reversed the finding of the lower court and held that against the general body of creditors the mortgage was not good. On appeal against that decision it was contended that in the absence of an appeal against the decree in the mortgage suit, the rule of *res judicata* should have been held to bar the disposal of the issue under S. 4 of the Insolvency Act.

Held, (1) that the subject-matter of the appeal was already *res judicata*.

The Official Receiver, Coimbatore v. *Palaniswami Chetty*, (1925) 49 M.L.J. 203: I.L R. 48 Mad. 750, followed.

Panchanada Velan v. *Vaithinatha Sastrial*, (1905) 16 M.L J. 63: I.L.R. 29 Mad. 333 (F B.), explained and not applied.

Appeal against the order of the District Court of Coimbatore dated 18th October, 1937 in C. M. A. No. 55 of 1935 preferred against the order of the Court of the Subordinate Judge of Coimbatore dated 9th October, 1934 and made in I. A. No. 816 of 1931 in I. P. No. 17 of 1930.

T. R. Venkatarama Sastri and *M. Krishna Bharathi* for Appellant.

C. V. Subramania Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The subject-matter of this appeal is a mortgage-deed executed by a person who subsequently became an insolvent. The date of the mortgage is 9th December, 1927 and the mortgagor was adjudicated insolvent in October, 1930.

* A. A. A. O. No. 84 of 1938. 5th January, 1940.

Sevadappa Goundar *v.* Narayanaswami Aiyar.

The appellant is the mortgagee. In June, 1931, he sued on his mortgage in the Court of the Subordinate Judge of Coimbatore. In August, 1931, the Official Receiver applied in Insolvency before the same Judge under Ss. 4 and 53 of the Provincial Insolvency Act to have the mortgage set aside. In October, 1934, the Subordinate Judge decreed the appellant's suit and dismissed the application of the Official Receiver. Against the decree, no appeal was filed by the Official Receiver who contented himself with filing an appeal against the order of dismissal under the Provincial Insolvency Act. That appeal was heard by the learned District Judge of Coimbatore who reversed the decision of the learned Subordinate Judge and under S. 4 of the Act held that the mortgage was not good against the rights of the general body of the insolvent's creditors. This is now an appeal against that order of the learned District Judge.

The only point upon which there has been any serious argument in this appeal is the question of *res judicata* which has been dealt with by the learned District Judge in paragraph 9 of his judgment. The argument in appeal is that the learned District Judge ought to have held that as there had been no appeal against the decree of the Subordinate Judge, he was precluded by the rule of *res judicata* from disposing of the issue before him under S. 4 of the Provincial Insolvency Act. The learned District Judge in disposing of the appeal says that there is really no substance in this contention:

> "As has been just now said both the petition and the mortgage suit were tried together and common evidence taken in both by the consent of parties. The governing litigation is the one on the insolvency side. As has been held in *The Official Receiver, Coimbatore* v. *Palaniswami Chetty*[1], it is the duty of the Court executing the mortgage decree to give effect under S. 4 of the Provincial Insolvency Act to the decision in the insolvency enquiry."

It seems to me obvious that apart from any specific rulings which may be cited, the plea of the appellant before the learned District Judge on the question of *res judicata* is one which should prevail. There was a decree of a competent Court on the question of this mortgage which had not been appealed against and therefore had become final. It was final and in full force and effect at the date when the learned District Judge heard the appeal and the learned District Judge ought to have recognised this fact and dismissed the appeal on that ground.

1. (1925) 49 M.L.J. 203: I.L.R. 48 Mad. 750.

It remains, however, to consider two rulings in this connection one of which has already been referred to by the learned District Judge and another of which has been brought to my attention during the course of the hearing of this appeal. *The Official Receiver, Coimbatore* v. *Palaniswami Chetty*[1] is a case which is not directly in point. The question at issue in that case was whether when proceedings under S. 53 of the Insolvency Act had been initiated by the Official Receiver, a suit on a mortgage which was then pending, ought or ought not to have been stayed, and the decision in the case was that the institution of proceedings under S. 53 of the Provincial Insolvency Act in no way takes away the jurisdiction of the ordinary Civil Court to try a mortgage suit and that therefore, the suit need not be stayed. There are however passages in the judgment which deal with the question of the concurrent jurisdiction of the Civil Court and of the Insolvency Court and there is an interesting distinction drawn by Mr. Justice Wallace between the position of the Official Receiver in defending a mortgage suit and his position as petitioner under the Insolvency Act. It is held by Mr. Justice Wallace that there may be certain defences against a mortgage suit which the Official Receiver impleaded in that suit is unable to put forward. For instance, it would not be competent for him to say that although the mortgage was true in fact and the mortgagor, that is, the insolvent had received the money covered by it, nevertheless, the mortgage ought to be set aside in the interests of the general body of creditors. Or, in other words, the Official Receiver might not be able to put forward some of the contentions which would justify him in filing an application under S. 53. But it cannot, I think, be held that in the present case, the Official Receiver in defending the mortgage suit was debarred in any way from putting forward the actual case, which he did in fact put forward both in the suit and in the proceedings under the Provincial Insolvency Act. There is some ambiguity in the way in which his pleadings have been framed. But, as the case came finally to be disposed of by the learned Judge, it seems clear to me that his real case was that there was no consideration for the mortgage at all. Such a defence was a perfectly valid defence to be put forward by him in his capacity as defendant in the mortgage suit. The distinction, therefore, which has been drawn

1. (1925) 49 M.L.J. 203: I.L.R. 48 Mad. 750.

Sevadappa Goundar *v.* Narayanaswami Aiyar.

in *The Official Receiver, Coimbatore* v. *Palaniswami Chetty*[1] is of no assistance to the respondent in the present case. Nor can it be contended here that by virtue of the fact that proceedings are pending under S. 63 of the Provincial Insolvency Act, the decision of the Insolvency Court must take precedence over any decree of the Civil Court. No doubt it has been held in *Official Assignee, Bombay* v. *Sundarachari*[2] that it is the Insolvency Court alone which is entitled to dispose of the subject-matter of an application under S. 53. But on the *chronology* of this case, it is clear that S. 53 cannot be applied at all. As has already been made clear, the mortgage was executed more than two years before the date of the insolvency. S. 53 therefore does not apply and the only order that can possibly be passed under the Provincial Insolvency Act to set aside the mortgage must be one under S. 4. I have been shown no authority which suggests that the subject-matter of S. 4 of the Provincial Insolvency Act is one with which the Insolvency Court alone is concerned. On the other hand, as has already been pointed out in *The Official Receiver, Coimbatore* v. *Palaniswami Chetty*[1], it is definitely held that the existence of insolvency proceedings does not take away the jurisdiction of the ordinary Civil Court.

The second case with which I must now deal is *Panchanada Velan* v. *Vaithinatha Sastrial*[3]. That is a case decided by a Full Bench of the Madras High Court in which there were two cross suits and an appeal was filed against only one of them, the other decree being left without any appeal. It was contended that the appellate Court could not dispose of the one appeal which was filed, on the ground, that the non-filing of the second appeal rendered the decree of the Court which was thus not appealed against final. The High Court held that the doctrine of *res judicata* could not apply to the facts of that case. It observed that the subject-matter of the litigation in the two suits was the same, the evidence was the same and the two suits were tried together.

"The doctrine does not apply when, as here, the very object of the appeal, in substance if not in form, is to get rid of the adjudication which is said to render the question which the appellate Court is asked to decide *res*

1. (1925) 49 M.L J. 203: I.L.R. 48 Mad. 750.
2. (1927) 53 M.L.J. 209: I.L.R. 50 Mad. 776.
3. (1905) 16 M.L.J. 63: I.L.R. 29 Mad. 333 (F.B.).

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judicata. The tenant's appeal in his suit, if successful, will have the effect of superseding the adjudication in the landlord's suit."

At the same time the High Court points out that technically two appeals ought to have been filed. Finally they say:

"It would lead to startling results if we were to hold that an Appellate Tribunal is precluded from dealing with a question which comes before it on appeal because an inferior Court, upon the same facts, but in a case other than the case under appeal, had given a decision which had not been appealed against at the same time as the decision in the case under appeal."

It is of course obvious from the facts of that case that, if the second appeal had been filed, it would have been filed in the same Court as the first appeal and no question arises at all as to the competency of the appellate Court to have decided the two appeals itself. The essential distinction in the present case is that the learned District Judge of Coimbatore was not competent to decide an appeal against the decree in the mortgage suit as the amount involved in the mortgage suit was Rs. 11,200. An appeal therefore lay only to the High Court. It seems to me that this is a fundamental distinction and renders the arguments of the learned Judges of the High Court in *Panchanada Velan* v. *Vaithinatha Sastrial*[3] inapplicable to the facts of the present case.

In the result, I am, therefore, of opinion that the learned District Judge in deciding this appeal ought to have decided it in the manner contended for by the appellant herein by holding that the subject-matter of the appeal before him was already *res judicata*. I accordingly set aside his order and restore the order of the learned Subordinate Judge with costs throughout.

Leave to appeal is granted.

K. C.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

John Baptist D'Souza .. *Petitioner** (*Respondent*)

v.

Lizzie Jane Lobo .. *Respondent* (*Petitioner*).

John Baptist D'Souza v. Lizzie Jane Lobo.

Indian Divorce Act (VI of 1869), Ss. 7, 18 and 19—Petition for declaration that marriage null and void and for maintenance—Parties natives and married in Mangalore—Husband though employed in Rangoon having no residence at Rangoon—When last living with wife at Mangalore—Jurisdiction.

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* C. R. P. No. 2094 of 1939. 15th December, 1939.

1. (1905) 16 M.L.J. 63: I.L.R. 29 Mad. 333 (F.B.),

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A person cannot be said to reside at a place where he spent only a day or two when he has got a fixed place of residence elsewhere; but where a person has no fixed place of residence, the place where he actually lives must be taken to be the place where he resides.

The parties not only belonged to Mangalore but were married in Mangalore and were living together last in Mangalore. At the time the respondent was actually living with his wife at Mangalore he had no fixed place of residence in Rangoon though he was employed in Rangoon.

Held, the husband must be deemed to be residing in the place where he actually lives and the District Court of South Kanara has jurisdiction to entertain a petition by the wife for a declaration that the marriage was null and void and for maintenance.

Petition under S. 115 of Act V of 1908 and S. 224 of the Government of India Act praying the High Court to revise the order of the District Court of South Kanara dated 6th July, 1939 and made in O. P. No. 55 of 1938.

E. Antony Lobo and *A. Viswanathan* for Petitioner.

G. A. Pais for Respondent.

The Court delivered the following

JUDGMENT.—This petition raises a question of jurisdiction, namely, whether the District Court of South Kanara had jurisdiction to entertain the application presented to it by the respondent in the present petition under Ss. 7, 18 and 19 of the Indian Divorce Act for a declaration that the marriage of the petitioner with the respondent is null and void and for maintenance, etc. The petition was by the wife against her husband. Both of them are natives of South Kanara and as would appear from the entry in the Marriage Register relating to their marriage in 1932, both are parishioners of the same parish in Mangalore. It appears however from the evidence that the respondent, that is the husband, has been employed for many years in the Telegraph Department in Burmah and has been residing most of the time at Rangoon. The petition was however put in in 1938 in the District Court of South Kanara on the ground that both the parties had last resided together at Mangalore in South Kanara in the respondent's own house at Jeppu. This fact, namely, that the husband and the wife lived together from at least February, 1938, to the beginning of April, 1938, in the respondent's house at Jeppu is not denied, and it is further clear that this was the period during which the two last resided together, because, thereafter, the husband went away to Rangoon and the wife remained behind at Mangalore till the petition was filed in July, 1938. The learned

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District Judge after taking evidence was satisfied that the husband and the wife did last reside together in Mangalore till the respondent left Mangalore for Rangoon on 5th April, 1938, and that therefore he had jurisdiction to entertain and deal with the application.

The only question that is argued in this petition is that the finding of the District Judge is wrong on the admitted facts of the case. As observed already, the admitted facts of the case show that the parties not only belong to Mangalore but were married in Mangalore and were living in Mangalore on more than one occasion. They lived together on two occasions after the marriage in Mangalore, once in 1934 and a second time from the end of 1937 till April, 1938 and on the latter occasion they lived together in the respondent's own house at Jeppu. A number of rulings have been quoted but it is not possible to say that the facts of the present case are clearly covered by any one of them. While it is obvious that a person who has no fixed residence elsewhere can be regarded as residing in any place in which he is actually found, nevertheless, where there is a fixed place of residence, a temporary sojourn in another place for a few days would not make him a resident of that place and give jurisdiction to the Court having jurisdiction over that place to entertain applications under the Act. In the present case, however, it is not established that the present petitioner (that is, the husband) had a fixed residence in Rangoon at the time when he was actually living together with his wife in Mangalore from February, 1938 to April, 1938. It is not established that he had any house of his own or a rented house or flat in Rangoon during this period. In fact, the evidence contained in his own letter to his wife would show that he had wound up the establishment and left his 'chokra' at the house of a friend and perhaps a few belongings also and it is clear that even for some time before he actually left Rangoon, he was getting his food from outside. It would seem therefore that during this period when he was living with his wife in Mangalore in his own house, he had no place in Rangoon, which he could call his residence. In these circumstances, can it be said that merely because he had a lien, so to say, on his post in the Telegraph Office during his leave, he must be regarded as a resident of Rangoon even during the time when he was

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spending his leave at Mangalore with his wife in his own house? I am of opinion that the answer to this must be in the negative. It is possible to regard a person as residing in a place where he is physically not present when he has got a permanent place of residence, but where he has no permanent place of residence or any place of residence which he can call his own available to him at all times, it is impossible to adopt the idea of a fictional residence at a place where he is not. In other words, where there is a residence, it is possible to regard a person as residing there though he is not actually present in the flesh at that place. But where there is no place of residence, this fiction is not available, and the person must be deemed to be residing in the place where he actually lives. It is impossible to allow the contention that during this particular period the respondent did not reside anywhere at all. He actually lived in Mangalore during this period and this was the period during which the couple lived together for the last time. Unless it is shown that the respondent must be deemed to have resided in a different place in the eye of the law, the actual facts established in the case—and in fact admitted—are more than sufficient to show that the couple resided together in Mangalore for the last time during the period in question. As observed already, the petitioner has failed to show that during this period he can be reasonably regarded as having resided in Rangoon or in any place other than Mangalore. In the view I have taken, it is unnecessary to deal with the different sets of facts which arose in the various cases that were quoted to me. The only principle that I can discover from the decisions is that that a person cannot be said to reside at a place where he spent only a day or two when he has got a fixed place of residence elsewhere; but where a person has no fixed place of residence, the place where he actually lives must be taken to be the place where he resides. This general principle which can be gathered from the cases that were quoted to me is sufficient to cover the present case because it has not been shown that, during the period when the couple lived together at Mangalore in the petitioner's own house for the last time, the petitioner can be regarded as having resided elsewhere.

The petition therefore fails and it is dismissed with costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Pitchai Pillai .. *Petitioner** (*Accused*)

v.

T. R. Ramaswami Aiyangar .. *Respondent* (*Complainant*).

Pitchai Pillai *v.* Ramaswami Aiyangar.

Indian Penal Code (XLV of 1860), S. 504—Saying during discussion "shameless fellow. I will shoe you"—If offence under S. 504.

When the petitioner, a Bill Collector, went to the complainant for collection, the complainant stated that he would pay in a week and during the discussion that followed the petitioner shouted "shameless fellow. I will shoe you".

Held, this did not amount to an offence under S. 504, Indian Penal Code.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Trichinopoly in C. A. No. 3 of 1939 preferred against the judgment of the Court of the Town Sub-Magistrate of Trichinopoly in C. C. No. 822 of 1938.

V. T. Rangaswami Aiyangar for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

Respondent not represented.

The Court made the following

ORDER.—The petitioner is a Bill Collector and he went to the complainant to collect the amount due by him. The complainant stated that he would pay in a week and during the discussion that followed the petitioner shouted "shameless fellow. I will shoe you". This does not amount to an offence under S. 504, Indian Penal Code, and the conviction of the petitioner under that section is unsustainable. It is therefore set aside and the fine if levied will be refunded.

K. S. —— *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

Dinshaw Dadabhai Italia .. *Appellant†* (*Defendant*)

v.

Mohamad Mohamad and others .. *Respondents* (*Plaintiffs*).

Dinshaw Dadabhai Italia *v.* Mohamad Mohamad.

Will—Construction of—Clause authorising executors to raise moneys for purposes of business—Clause limiting liability to trade assets—English and

* Crl. R. C. No. 652 of 1939. (Crl. R. P. No 610 of 1939). 23rd February, 1940.

† O. S. A. No, 21 of 1937. 27th April, 1939.

Dinshaw Dadabhai Italia v. Mohamad Mohamad.

Indian law regarding executor's powers—Indian Succession Act (1925), *S. 307 (1)—General assets of the estate mortgaged for raising moneys—Invalid in the circumstances.*

Under English law, unless he is authorised by the will, an executor has no power to carry on the testator's business, except for the purpose of winding it up. *Collinson* v. *Lister*, (1855) 20 Beav. 356: 52 E.R.. 639. Where the will contains authority to carry on the testator's business but nothing further, the executor is confined to the employment of the trade assets. If he is authorised to use the general assets he can, of course, do so, but there must be express authority for this. *Cutbush* v. *Cutbush*, (1739) 1 Beav. 184: 48 E.R. 910; Ex parte *Garland*, (1803) 10 Ves. Jun. 111: 32 E.R. 786; Ex parte *Richardson*, (1818) 3 Madd. 138: 56 E R. 461; *M'Neillie* v. *Acton*, (1853) 4 De G. M. & G. 744: 43 E.R. 699, Ref.

There is no difference in the law of India from the law of England with regard to these matters. The generality of the words of sub-S. (1) of S. 307 of the Indian Succession Act do not imply that the administration is entitled to alienate the estate properties for purposes which are not consistent with the testator's trust.

Where the will of a Mohamedan testator contained the following clauses:

"I expressly authorise and empower my executors to raise money for the businesses by borrowing from banks, sowcars or other persons as the exigencies of the businesses require and for that purpose to pledge the credit of the several firms.

"I hereby authorize my executors to deal with the various items of my estate whether in the businesses or otherwise by way of sale or alienation in any other manner and to invest the proceeds in any other forms of investment which they consider suitable in their discretion. Such investments shall not be limited to forms prescribed by the Indian Trusts Act", and the executors raised moneys by mortgages for the businesses charging the general assets of the estate with them.

Held, that the will imposed a restriction. The will gave the executors power to pledge 'the credit' of the business for the purpose of carrying it on. This clause expressly limited their power of charge for the purposes of the business to the trade assets. The general assets of the estate could not form part of the credit of the business unless there was express power to charge them for the purposes of the business and this there was not. Nor could there be any justification for the suggestion that the clause authorising the executors to deal with 'the various items' of his estate whether in the business or otherwise, should be read as enlarging the powers of the executors. The words 'and to invest the proceeds in any other firms of investment which they consider suitable in their discretion' indicated what was meant, namely, that the executors were to have the right of disposing of the assets and re-investing the proceeds in more suitable securities pending the administration of the estate, should they so think fit.

Tarakeswar Das Gupta v. *Ambika Charan Bhattacharjee*, (1927) I.L.R. 55 Cal. 892, relied on.

Ma Sein Bye v. *S. R. M. M. R. M. Chetty Firm*, (1925) I.L.R. 3 Rang. 443, dissented from.

On appeal from the preliminary judgment and order of the Hon'ble Mr. Justice Lakshmana Rao dated the 20th day of

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July, 1936 and 16th day of October, 1936, respectively and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 513 of 1928.

T. R. Venkatarama Sastri, K. S. Sankara Aiyar and *T. Aravamuda Aiyangar* for Appellant.

A. Viswanatha Aiyar, K. Rajah Aiyar for *M. Natesan, O. T. G. Nambiar, V.V. Srinivasa Aiyangar, V. V. Ramadurai, C. Vasudevan* and *A. Ramaswamy Aiyar* for Respondents.

The judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—This appeal arises out of a suit filed on the Original Side of this Court by the first, second and third respondents for the administration of the estate of their grandfather, one Hussain Mean, who died in the month of December, 1919, leaving a large estate. The deceased had for many years traded in partnership with his two brothers, Mohammad Jaffar and M. Shamsuddin, and by his will he directed that the business should be carried on by his executors after his death until all his children had attained majority. The executors were Mohammad Jaffar, who is now dead, and his eldest son, Mohammad Yusuf, the fourth respondent, who was the second defendant in the suit. A decree for administration of the estate under the directions of the Court was passed, but before the suit came on for hearing Ananthakrishna Aiyar, J., added as defendants the appellant and the twenty-second respondent who is in the position of an appellant, having filed a memorandum of objections to the decree. The appellant and the twenty-second respondent claimed to be the mortgagees of certain properties belonging to the estate. The validity of the mortgages was challenged and in order that all questions arising out of the administration of the estate might be dealt with by the Court, the mortgagees were added as defendants. I will not pause to consider whether they should have been joined as defendants or whether the questions regarding their mortgages should have been left to be decided in separate proceedings, as all the parties to the suit and the appeal are agreed that the questions with regard to these mortgages should be decided in the suit.

The mortgage in favour of the appellant was executed on the 25th March, 1927, by the surviving sons of the testator, the defendants 2 to 7, and by his widow, Mohammad Bi. There was another heir, a daughter named Hassan Bi, but she did not join in the execution of the deed. The properties mortgaged consisted

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of five items, two of which were sold before the suit was instituted. It is common ground that the mortgage was created for the purposes of the business, but all the properties charged belonged to the general estate of the testator. Lakshmana Rao, J., who tried the suit held that the executors were not entitled to charge the assets of the testator's general estate for the purposes of carrying on the business and that the mortgage was valid merely to the extent of the respective interests of the executants in the properties charged. The appellant contends that by the will the executors were given full power to mortgage the general assets of the estate for the purposes of the business, and that as the surviving executor had executed the deed, the estate is bound, notwithstanding that he was not described as an executor in the document. The appellant also says that even if the mortgage is invalid so far as the estate is concerned he is entitled to rank as a creditor of the testator to the extent of Rs. 20,000.

The mortgage in favour of the twenty-second respondent is dated 16th October, 1928 and embraces 25 items of property. It was executed during the pendency of the suit and the learned Judge held that the doctrine of *lis pendens* applied. He also held that the mortgage was invalid as against the estate for the reason which applied in the case of the appellant's mortgage. All the properties mortgaged belonged to the general estate and the mortgage has been created for the purposes of the business. These facts are not in dispute. On behalf of the twenty-second respondent it is said that the learned Judge erred in applying the doctrine of *lis pendens* and that he should have held that the mortgage was binding on the estate and not merely on the interests of the heirs who had signed the deed, namely, the defendants 2 to 7. The only questions raised in the appeal are those relating to the two mortgages.

In his will the testator refers to three businesses, but we are told that it was the same partnership business carried on at different places under different styles. In his will the testator declared that his estate was to have two shares and his brother Mohammad Jaffar one share in the business. His brother M. Shamsuddin had predeceased him and the testator directed that his share was to be ascertained and was not to be utilized in the business. After further directions with regard to the carrying on of the business the will proceeds :—

"I expressly authorize and empower my executors to raise money required for the businesses by borrowing from banks, sowcars or other persons as the exigencies of the businesses require and for that purpose to pledge the credit of the several firms.

"I hereby authorize my executors to deal with the various items of my estate whether in the businesses or otherwise by way of sale or alienation in any other manner and to invest the proceeds in any other forms of investment which they consider suitable in their discretion. Such investments shall not be limited to forms prescribed by the Indian Trusts Act."

The testator constituted his executors the guardians of the properties of his minor children. He bequeathed to Ummu Salima, the daughter of his deceased son, Abdul Aziz, the share to which her father would have been entitled if he had survived the testator, and he bequeathed to the children of Rabia Bi the shares to which she would have been entitled had she lived. Rabia Bi had four children, three of whom were the plaintiffs in the suit. The testator did not make any other dispositions of property. I may mention that neither here nor below has any question been raised as to the validity of the will under the Mohammadan Law. The heirs of the testator have all come of age and they have accepted the will as being valid. What is not accepted is the construction which the appellant and the 22nd respondent would have placed on the provisions of the will relating to the carrying on of the business.

In his argument in support of the appellant's case Mr. T. R. Venkatarama Sastriar conceded, as I understand him, that an executor is not entitled to mortgage or charge the general assets of the estate for the purposes of carrying on the testator's business, unless he is so authorized by the will. Mr. Sastriar relied merely on the wording of the will. On behalf of the 22nd respondent Mr. V.V. Srinivasa Aiyangar has, however, contended that an executor is entitled to charge the general assets of the estate for the purposes of carrying on the testator's business without any authority in the will. Except for a decision of a Rangoon High Court to which I shall presently refer, he has quoted no case in support of his contention. There are numerous decisions which negative the proposition; and as the question has been raised it is necessary to deal with it.

Under English Law, unless he is so authorized by the will, an executor has no power to carry on the testator's business, except for the purpose of winding it up; *Collinson* v. *Lister*1.

1. (1855) 20 Beav. 356: 52 E. R. 639.

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Where the will contains authority to carry on the testator's business but nothing further, the executor is confined to the employment of the trade assets. If he is authorised to use the general assets, he can, of course, do so, but there must be express authority for this. (See *Cutbush* v. *Cutbush*[1], Ex parte *Garland*[2], Ex parte *Richardson*[3] and *M'Neillie* v. *Acton*[4].) In *Cutbush* v. *Cutbush*[1], Lord Langdale, M.R., observed:

"It seems to me, that any person dealing with one carrying on trade must be taken to rely upon the personal liability of the party conducting it; but the security is not limited to the personal credit of the party where the testator has directed the trade to be carried on with his assets; without authority in the will, executors have no right so to deal with the property of the testator and carry on trade with his assets; a party therefore who relies on the credit of the testator's estate, should look to the will to ascertain the extent to which the testator has authorised his assets to be embarked in the trade; and if any one had looked at this will, he would have seen that it was limited to the 'capital credits, stock and effects which were due, owing or belonging to him in the said trade or business at the time of his decease'."

In Ex parte *Richardson*[3], Leach, Vice-Chancellor, said:

"A trustee under a will, carrying on a trade, pledges the trust property given to him for that purpose, and also his own property; but what is the trust property given to him for that purpose must depend upon the terms of the will. . . . .

In this case all that was meant to be left to carry on the trade was the capital in the trade; and the executrix was not authorised in employing one shilling of the assets beyond the capital. What the executrix has employed in the trade beyond the capital was in breach of her trust."

In *M'Neillie* v. *Acton*[4], Turner, L.J., said:

"There appears, therefore, to be no case which has gone to the extent of saying that a mere direction to continue the trade is to operate as a charge of the trade debts contracted in continuing the trade on all the estate of the testator; and the question is whether, upon any fair construction, it can be so considered? The consequence of it would be, that all the other directions which are contained in the will must be suspended during the period for which the trade is to continue. If the debt contracted in the course of the trade, or the right of the executors to be indemnified in respect of the expense incurred in carrying on the trade, is to be a charge on the whole of the estate of the testator, the necessary consequence would be that no part of the estate could in the meantime be applied in payment of any of the legacies given in the will, and that all administration of the testator's estate must stop until the period when the trade is wound up. That is, a construction so unreasonable that, unless there are words sufficient for the purpose, it is one, in my opinion, to which the Court would not resort."

In the present case the will provided that the business should be carried on until all the testator's children had attained

1. (1739) 1 Beav. 184: 48 E.R. 910.
2. (1803) 10 Ves. Jun. 111: 32 E.R. 786.
3. (1818) 3 Madd. 138: 56 E.R. 461.
4. (1853) 4 De G., M. & G. 744: 43 E.R. 699.

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majority. If the proposition advanced on behalf of the twenty-second respondent were correct it would have meant that no steps could have been taken for the administration of the estate for many years.

A lot has been said in the course of the argument with regard to the right of indemnity. This question was dealt with by Jessel, M.R., in In re *Johnson*: *Shearman* v. *Robinson*[1] and the effect of the decision is concisely stated in the head note to the report which reads as follows:

"Where a trader has by his will directed his executor or trustee to carry on his trade and to employ a specific portion of the trust estate for the purpose, the rule is that, though the executor or trustee is personally liable for debts incurred by him in carrying on the trade pursuant to the will, he has the right to resort for his indemnity to the specific assets so directed to be employed, but no further; and consequently, the creditors of the trade are entitled to stand in the place of the executor and trustee, and to claim the benefit of that right so as to obtain payment of their debts; but the rule does not apply where the executor or trustee is in default to the specific trust estate devoted to the trade; in such a case, the defaulting executor or trustee not being himself entitled to an indemnity except upon the terms of making good his default, the creditors are in no better position, and are therefore not entitled to have their debts paid out of the specific assets unless the default is made good."

There is no difference in the law of India from the law of England with regard to these matters. S. 307 (1) of the Indian Succession Act says that, subject to the provisions of sub-S. (2), an executor or administrator has power to dispose of the property of the deceased, vested in him under S. 211, either wholly or in part, in such manner as he may think fit. The generality of the words of this sub-section does not, however, imply that the administrator is entitled to alienate the estate properties for purposes which are not consistent with his trust. Sub-S. (2) provides that where the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, the general power given to an executor by sub-S. (1) is subject to any restriction which may be imposed by the will appointing him. In this will there is express restriction, but even if there were not, it would be obviously improper for an executor to utilize the general assets of the estate for the purposes of carrying on a business of the testator.

The case to which Mr. Srinivasa Aiyangar referred is that of *Ma Sein Bye* v. *S. R. M. M. R. M. Chetty Firm*[2], where the

1. (1880) 15 Ch. D. 548. 2. (1925) I.L.R. 3 Rang. 443.

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executors had created an equitable mortgage for the purposes of carrying on a business in which the testator had been a partner. It was held that by reason of S. 269 of the Succession Act, 1865 (which was then in force) an executor had an unqualified right to mortgage. S. 269 was in these words:

"An executor or administrator has power to dispose of the property of the deceased either wholly or in part, in such manner as he may think fit."

It was apparently not realised that the section did not extend the powers of an executor beyond those conferred by the law of England, and the principles embodied in the English decisions had application. In *Tarakeswar Das Gupta* v. *Ambika Charan Bhattacharjee*[1], a Division Bench of the Calcutta High Court held that an executor or administrator has no absolute power to dispose of the property of the deceased if it is not necessary for the purpose of the administration of the estate and that as the section had been taken from English law the English authorities were applicable. The argument that the observations in the Rangoon case correctly state the law cannot be accepted.

I have referred to the relevant portions of the will in this case and I have mentioned that in my opinion it imposes a restriction. I will explain what is in my mind. The will gives the executors power to pledge "the credit" of the business for the purpose of carrying it on. I consider that this clause expressly limits their power of charge, for the purposes of the business, to the trade assets. The general assets of the estate cannot form part of the credit of the business unless there is express power to charge them for the purposes of the business and this there is not. Nor can I see any justification for the suggestion that the clause authorising the executors to deal with "the various items" of his estate whether in the business or otherwise should be read as enlarging the powers of the executors. The words "and to invest the proceeds in any other forms of investment which they consider suitable in their discretion" indicate what was meant. The executors were to have the right of disposing of the assets and re-investing the proceeds in more suitable securities pending the administration of the estate should they so think fit.

1. (1927) I.L.R. 55 Cal. 892.

I hold that the will does not confer upon the executors the power to charge the general assets and inasmuch as these mortgages were created for the purposes of the business, they are invalid in law. In these circumstances it is not necessary to consider whether the fourth respondent's signature in the mortgages meant that he signed as executor. It may be assumed for the purposes of this appeal that he did so sign. His signature even if appended in his capacity of executor would not bind the estate, because he had no power to mortga e the general assets for the purposes of the business.

The contention that the appellant is entitled to be regarded as a creditor of the testator in respect of the sum of Rs. 20,000 is based on allegations of fact which have not been proved. At the time of the testator's death the partnership business had a current account with one Harsukhdoss Chowkmull, who held a floating charge on some of the private properties of the testator. This account at the time of the death of the testator was overdrawn to the extent of Rs. 90,000. On 1st April, 1926, the fourth respondent executed two mortgages, one for Rs. 30,000 and the other for Rs. 20,000. The properties covered by these mortgages were subsequently mortgaged to the appellant. It has been contended that the amount raised under the mortgage for Rs. 20,000 was utilized in reduction of the overdraft in the current account with Hursukhdoss Chowkmull. When the appellant's mortgage was executed the two mortgages of 1st April, 1926, were discharged and it is said that it must be taken that the appellant's money to the extent of Rs. 20,000 had been utilized in payment of debts due by the testator. This matter was not raised in the trial Court, and in the judgment it is expressly stated that none of the parties claimed any right under the floating security held by Harsukhdoss Chowkmull. In these circumstances the appellant is not entitled to raise this contention, but it is clear that, even if he were entitled to do so, he would have no right to be regarded as a creditor of the testator. The account books of the business relating to the account with Harsukhdoss Chowkmull have been put in evidence and the amount which was outstanding at the time of the testator's death was paid off by subsequent payments into the account. The account was further drawn upon and at one time the amount owing was Rs. 1,75,000 but this does not alter the fact that payments in had discharged the liability at the time of the

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death of the testator. Therefore, on the facts the appellant is not entitled to rank as a creditor of the testator, even if he had set up that claim in the trial Court.

In 1928 the testator's business was transferred by the executors to themselves. The business subsequently failed and the executors were adjudicated insolvents. The appellant asks that he should be allowed to stand in the shoes of the executors for purposes of claiming repayment from out of the business assets of the amounts borrowed from him and shown to have been utilized in the business. This is not objected to and there will be a direction to this effect embodied in the decree. The appellant further asks that certain immovable property, described as item No. 24 in the schedule to the plaint, should be allotted to the fourth respondent in respect of his share of the estate, if this is possible. The reason for the request is that the appellant purchased this property during the pendency of the litigation. There is no objection to a direction to this effect being also included in the decree and this will also be ordered.

It is not necessary to consider the contention raised by the twenty-second respondent to the finding of the learned trial Judge that the doctrine of *lis pendens* applies, because, even if it does not apply, the mortgage is not one which binds the estate generally, but merely the interests of the respective heirs who signed the document.

The appeal and the memorandum of cross-objections will be dismissed with costs in favour of the contesting respondents, who are respondents 1 to 3, 8 and 27 to 34. There will be one set of costs in respect of the memorandum of appeal, and one set in respect of the memorandum of objections and a certificate for two counsel will be granted in each case.

K.C. —— *Appeal and memo of cross-objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Katragada Lakshminarasamma .. *Appellant** (*Plaintiff*)

v.

Singamsetti Venkatasatyanarayana Rao .. *Respondent* (*Defendant*).

Lakshminarasamma *v.* Venkatasatyanarayana Rao.

Madras Estates Land Act (I of 1908), S. 125—Mortgage executed after passing of Act to pay off mortgage created before the Act—If mortgage created before Act by reason of right of subrogation.

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* S. A. No. 605 of 1936. 10th October, 1939.

Lakshmi-narasamma *v.* Venkata-satya-narayana Rao.

It will be stretching the language of S. 125 far too much to hold that by reason of a right of subrogation arising out of it a mortgage should be deemed to be an encumbrance created before the passing of the Act, although in fact it was executed subsequent to the Act.

Sreekanta Sundararamiah v. *Venkatasubbiah*, (1924) 46 M.L J. 380, applied.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatam dated 9th December, 1935 and made in A. S. No. 33 of 1935 (A. S. No. 261 of 1934, District Court, Kistna) preferred against the decree of the Court of the District Munsif of Masulipatam dated 24th September, 1934 and made in O. S. No. 95 of 1933.

Ch. Raghava Rao for Appellant.

K. Krishnamurthi for Respondent.

The Court delivered the following

JUDGMENT.—The only question arising for decision in this appeal is whether a mortgage executed after the passing of the Madras Estates Land Act can be regarded as an "encumbrance created before the passing of the Act" within the meaning of S. 125 thereof by reason of the fact that the mortgagee paid off a mortgage executed before the Act and thereby became entitled to be subrogated to it.

The facts, so far as they are material for the determination of this question, may be briefly stated. The appellant purchased the property which is a ryoti holding in an estate from one Subba Rao who had purchased it in October, 1926, at a rent sale held at the instance of the land-holder for recovery of arrears of rent due from the registered owner of the land. Long before the rent sale, however, the property had been mortgaged by the owner to one Prabhakaramurtamma under a mortgage (Ex. I) dated the 5th November, 1910. The deed provided that the mortgagee should, out of the mortgage money, pay off on earlier mortgage Ex. IX of 1904 on the same property and that the security should be kept alive for the benefit of the mortgagee. A decree having been obtained on the mortgage in O. S. No. 19 of 1923 of the District Court, Kistna, the property was brought to sale in execution and the respondent in this appeal purchased it in court auction. The appellant on the strength of the title acquired under the rent sale obstructed the respondent when the latter attempted to take delivery of the property in pursuance of his purchase at the execution sale but the obstruction was removed by a summary order of Court in E. A. No. 1 of 1931 filed in that mortgage

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suit. He thereupon brought the present suit to set aside that summary order and establish his right to the property against the respondent.

The Court below has dismissed the suit on the ground that the rent sale at which the appellant's predecessor-in-title purchased the property passed no title to the purchaser as it had been already sold at an earlier rent sale held in 1925. But as the learned Subordinate Judge himself held that the earlier sale was void as the pattadar was dead when the notice of such sale was served by affixture to his house, there was no reason why the second sale which, according to him, was held in due compliance with all the formalities prescribed by the Act, should not operate to pass title to the purchaser. The respondent's counsel rightly admitted that the decision of the learned Subordinate Judge could not be supported on that ground. He attempted however to support the decree appealed against by contending that the appellant's title derived through the rent sale referred to above could not prevail against the respondent's purchase at the Court sale in execution of the mortgage decree, having regard to the provisions of S. 125 of the Act. That section, so far as it is material here, provides that when a holding or part of a holding is sold for arrears due in respect thereof, the purchaser shall take subject to "any encumbrances created before the passing of the Act". The saving of encumbrances existing at the date of the Act is, of course, due to the fact that under the earliest Rent Recovery Act, rent was not a first charge on the holding, whereas under S. 5 of the present Act, it is made a first charge, with the result that encumbrances created after this Act came into force are subordinated to the landholder's claim for rent. *Prima facie*, the mortgage Ex. I to which the respondent traces his title having been executed in 1910, it seems impossible to regard it as an encumbrance created before the passing of the Act in 1908. But the respondent's counsel contended that the mortgage deed having expressly provided for the discharge of the earlier mortgage under Ex. IX of the year 1904 and for the keeping alive of that security, the mortgage Ex. I, must be deemed to be an encumbrance created before the passing of the Act within the meaning of S. 125. In support of this contention, reliance was placed on *Sreekanta Sundararamiah* v. *Venkatasubbiah*[1] and *Venkatanarasimharaju*

1. (1924) 46 M.L.J. 380 at 382.

Lakshmi-narasamma v. Venkata-satya-narayana Rao.

v. *Siddha Chetty*.[1] But it is to be noted that both these decisions relate to a case where the later mortgage executed after the Act was taken by the same person who held the earlier mortgage which was thus merely renewed under the later deed and the Court applied the principle:

> "that a man by taking a further security for his money that is charged upon land, does not, and cannot be taken thereby to have intended to, give up his rights under the earlier deed which he had"

and held that though the suit was brought on the later mortgage, it must be regarded as having been based equally upon the earlier mortgage which had been created before the passing of the Act. But the principle cannot be invoked by the respondent here as he cannot in any sense be regarded as having held any mortgage created prior to the Act, as Ex. IX had been executed to a third party. The respondent might be entitled to be subrogated to the rights of the mortgagee under Ex. IX in a question with an intermediate mesne encumbrancer, if any, but it would, in my opinion, be stretching the language of S. 125 far too much to hold that by reason of such a right of subrogation arising out of it, the mortgage under Ex. I must be deemed to be an encumbrance "created before the passing of the Act" although in fact it was executed subsequent to the Act. The distinction, for purposes of S. 125, between a mortgage taken merely in renewal of an earlier one in favour of the same person and a mortgage taken by a person who pays off a prior encumbrance and becomes thereby entitled to a right of subrogation was recognised in *Sreekanta Sundararamiah* v. *Venkatasubbiah*[2], the learned Judge expressing the opinion that the principle of that decision might not apply to a person who merely claims a right of subrogation.

I hold, therefore, that the rent sale under which the appellant claims title operated to vest the property in the purchaser free from the mortgage under Ex. I and prevails against the title acquired by the respondent by his purchase at the Court sale in execution of the decree obtained on that mortgage.

The appeal succeeds and the appellant's suit is decreed so far as it relates to the property covered by the second rent sale held on 19th October, 1926. The parties will pay and receive proportionate costs throughout.

Leave granted.

K. S. *Appeal allowed.*

1. (1937) 1 M.L.J. 399. 2. (1924) 46 M.L.J. 380.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KUNHI RAMAN.

Abubucker Ebrahim and another .. *Appellants** (*Defendants*)

v.

Maganlal K. Javeri .. *Respondent* (*Plaintiff*).

Abubucker Ebrahim *v.* Maganlal K. Javeri.

Torts—Malicious prosecution—What plaintiff must prove—Absence of reasonable and probable cause and malice — Defendant honestly believing plaintiff to be party to fraud—Malice negatived.

In an action for malicious prosecution the plaintiff must prove absence of reasonable and probable cause and also malice. Absence of reasonable and probable cause does not necessarily mean malice. Where it is found that defendant honestly believed that plaintiff was a party to a fraud on him there is no malice, even though it is found that he had no reasonable grounds to launch the prosecution.

Hicks v. *Faulkner,* (1878) 8 Q.B.D. 167, relied on.

On appeal from the judgment and decree of the Hon'ble Mr. Justice Gentle dated the 5th day of October, 1938 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 205 of 1935.

S. Ramaswami Aiyar and *I. Chakrapani* for Appellants.

T. V. Ramanatha Aiyar for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellants appeal from a decree passed by the Original Side of this Court awarding the respondent damages for malicious prosecution. The first appellant carries on business in edible oils in Bombay and has a branch office in Madras. The Madras branch was opened in the month of January, 1933 and the respondent was placed in charge of it. At the end of August, 1933, the respondent's services were dispensed with and on the 22nd October, 1933, the second appellant became the manager of the Madras branch. On the 31st October, 1933, the second appellant received a visit from one Subramaniam Chetty and a broker named Murthi. It is common ground that Murthi had acted as the broker in transactions with the first appellant's Madras branch during the period the respondent was in charge of it. Murthi represented to the second appellant that Subramaniam Chetty was a big merchant carrying on business in Mambalam, Madras, and on the strength of his recommendation the second appellant agreed to sell to

*O. S. A. No. 72 of 1938. 16th August, 1939.

Subramaniam Chetty 75 cases of edible oils at the price Rs. 14-8-0 per case, payment to be made in three days' time. The contract having been entered into the goods were delivered to Subramaniam Chetty. He did not pay for them on the day arranged and has never paid for them. On the 5th November, 1933, the second appellant met Murthi and told him that Subramaniam Chetty had defaulted. Murthi then said that Subramaniam would be coming to pay the amount in the course of that day or the next. Subramaniam Chetty did not appear that day or the next day and the second appellant was unable to trace his whereabouts, but as the result of inquiries he ascertained that the respondent was doing business in vegetable oils and that the cases which had been sold to Subramaniam Chetty had been removed to a small godown in Thathamuthiappan Street, Madras, which had been rented by the respondent and Murthi. As default had been made in payment, the second appellant grew anxious and it is his case that he asked Murthi to accompany him to Mambalam to show him where Subramaniam Chetty lived. Murthi put him off by various pretexts and he never found Subramaniam Chetty. On the 10th November, 1933, the second appellant in the name of the first appellant wrote a letter to the officer in charge of the Law College Police Station, Madras, setting out substantially these facts. The letter concluded with the following paragraph:—

"Under these circumstances, we are obliged to infer and believe that all these three persons have colluded together with the sole object of defrauding us of the cost of the goods and thus cheat us from the very beginning. Now we find on further inquiry that the said godown is empty the said 75 cases having been despatched to some destination. As the parties have done a criminal act we request yon to apprehend and book them for the offence committed and also make enquiries both at Salt Cottaurs, Madras Beach, and Egmore Stations, to the stations to which the cases have been despatched and stop delivery of the same."

On receipt of this letter the police searched for Subramaniam Chetty, Murthi and the respondent, and on the 11th November arrested them, charging them with cheating under Ss. 415 and 420 of the Indian Penal Code. The magisterial proceedings continued until the 10th July, 1934 when the three accused were discharged. On the 9th May, 1935, ten months later, the respondent filed the suit out of which this appeal arises. The case was tried by Gentle, J., who held that the respondent had proved his case and was entitled to the sum of Rs. 1,500 as damages.

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In the course of his evidence the respondent stated that he had bought the 75 cases from Subramaniam Chetty at the price of Rs. 14-10-0 per case, two annas more than Subramaniam had paid. He also stated that he had re-sold 50 of the cases at Rs. 13-8-0 per case on the 4th November, 1933 and the balance, except two cases, at the price of Rs. 14-6-0. He alleged that the goods were sold minus their cases and that he was able to dispose of the cases at twelve annas each. This statement rests entirely on his own evidence which is not of a convincing nature. The transactions which the respondent had entered into in respect of these goods were not known to the appellants when the letter of complaint was written to the police. All that was known was that the goods had been removed immediately to the godown which the respondent and Murthi had rented and that the goods had disappeared. It also transpired during the course of the suit that this godown had only been rented by the respondent and Murthi on the 1st November, 1933, the day after the sale to Subramaniam Chetty.

In order to succeed in an action for malicious prosecution the plaintiff has to prove:—(1) Absence of reasonable and probable cause for the prosecution, and (2) malice on the part of the person who launched the proceedings. In deciding whether there is absence of reasonable and probable cause for the prosecution the Court can only have regard to the facts known at the time of the presentation of the complaint. The learned Judge held that the fact that the goods had been removed to the godown rented by the respondent and Murthi and had been disposed of from there did not constitute sufficient reason for proceeding against the respondent. Consequently he found that the respondent had proved that there was absence of reasonable and probable cause for the prosecution. Dealing with the question of malice the learned Judge said:

"The plaintiff in addition must, as I have pointed out earlier, also show that there was malice. This does not mean ill-will, spite or hatred, but a wrong motive. The second defendant having failed to receive payment and being unable to find the purchaser of his master's goods, was disturbed. He obviously thought his conduct would incur his employer's displeasure and when it was ascertained that the goods which had been sold were delivered at the plaintiff's godown, his only thought was to be able to have the plaintiff together with others in the custody of the police in the hope perhaps that this would appease his employer. Not having made any enquiry at all and recklessly making the charge he did he could not have *bona fide* come to the conclusion that there was reasonable and probable cause for the prosecution.

If he had not the information, *bona fide* to come to that conclusion, in my view, it shows that he was guilty of malice."

I concur in the finding of the learned Judge that the respondent did prove want of reasonable and probable cause for the prosecution. Knowledge that the goods had been removed to a godown rented by the respondent and Murthi and had disappeared was not sufficient to justify the complaint against the respondent. But I am unable to concur in the finding of the learned Judge that the respondent has established malice and I do not accept the conclusion that the second appellant was actuated in his complaint against the respondent by the thought that if he preferred the complaint and got him arrested it would appease his employer. Malice may be implied when there is absence of reasonable and probable cause, but it does not necessarily follow from the fact that proceedings have been launched without reasonable and probable cause that the person launching them did in fact act maliciously. Whether malice should be implied will be depending on the circumstances. It would be a proper inference if it is shown that the defendant acted recklessly. The position is stated in the well-known judgment of Hawkins, J., in *Hicks* v. *Faulkner*[1], in which Huddleston B concurred. Hawkins, J., said:

"The malice necessary to be established is not even malice in law such as may be assumed from the intentional doing of a wrongful act (see *Bromage* v. *Prosser*[2], *per* Bayley J.), but malice in fact—*malus animus*—indicating that the party was actuated either by spite or ill-will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody. In order to arrive at a conclusion on the question, the jury are to take into consideration all the circumstances of the case, and to form their own opinion upon them uninfluenced by any opinion of the Judge unless that opinion accords with their own view. If among the circumstances it appears to the jury that there was no reasonable ground for the prosecution, they may—though by no means bound to do so—well think that it must have been dictated by some sinister motive on the part of the person who instituted it. Absence of reasonable cause, to be evidence of malice, must be absence of such cause in the opinion of the jury themselves, and I do not think they could be properly told to consider the opinion of the Judge upon that point if it differed from their own—as it possibly might, and in some cases probably would—as evidence for their consideration in determining whether there was malice or not. In no case, however, will their finding relieve the judge of the duty of determining for himself the question of reasonable cause as an essential element in the case. Want of reasonable cause is for the Judge alone to determine, upon the facts found, for the jury; as evidence of malice

1. (1878) 8 Q.B.D. 167.
2. (1825) 4 B. & C. 247 at 255: 107 E.R. 1051 at 1054.

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it is a question wholly for the jury, who, even if they should think there was want of probable cause, might nevertheless think that the defendant acted honestly and without ill-will, or any other motive or desire than to do what he *bona fide* believed to be right in the interests of justice in which case they ought not, in my opinion, to find the existence of malice: *Mitchell* v. *Jenkins*[1], *Turner* v. *Ambler*[2], and *Lister* v. *Perryman*[3], *per* Lord Westbury."

What the Court has to decide is whether the facts here justify the inference that the respondent was actuated by malice in the sense here indicated. It is not disputed that if the second appellant were actuated by malice, his employer, the first appellant, would also be liable.

I am of opinion that the evidence on the record does not justify the Court holding that malice on the part of the second appellant has been proved. I go further. In my opinion the evidence points to the conclusion that the second appellant honestly thought that his employer had been defrauded. The goods were sold on the 31st October, 1933, on the condition that the money would be paid within three days. It was not then paid and in spite of what Murthi had said in the interval it had not been paid by the 10th November when the letter of complaint was written. The second appellant had traced the goods to a godown which the broker and the respondent had rented and from there they had disappeared. The second appellant is not a lawyer but a layman and I can understand that in the circumstances mentioned he formed the honest conclusion that the respondent was implicated in a fraud. The question is not whether a fraud had been committed but whether the second appellant believed that it had. I consider that there is indication that he honestly held that opinion. The respondent not having proved malice the fact that he has shown the absence of reasonable and probable cause does not help him. He must succeed on both points and having failed on one his suit must be dismissed.

The appeal will be allowed and the suit dismissed with costs in favour of the appellants both here and below.

K. S. *Appeal allowed.*

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1. (1833) 5 B. & Ad 588: 110 E.R 908.
2. (1847) 10 Q.B 252 at 254: 116 E.R. 98.
3. (1870) L.R. 4 H.L. (Eng. & Irish A.C.) 521, 538.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Ramachandra Deo .. *Appellant** (*Plaintiff*)

v.

Kamoju Balaji and others .. *Respondents* (*Defendants*).

Ramachandra Deo v. Kamoju Balaji.

Madras Estates Land Act (I of 1908), S. 77—Non-occupancy ryot—Adverse possession—Slow encroachment upon land of zamindar—Presumption of title to land free of rent—Notice essential to landholder.

There is nothing in the Madras Estates Land Act which enables the non-occupancy ryot to prescribe for title to hold the land free of rent. In the absence generally of demarcation of holdings in zamindari estates and the want of a survey map, the recorded area of land in the landholder's books is not based on exact measurements nor calculated with mathematical precision. It is easy for a ryot therefore to encroach gradually upon an unoccupied land adjacent to his holding and the encroachment may pass unnoticed for years. Adverse possession in order to become a basis of title must be brought to the notice of the true owners. If the persons wish to prescribe for a higher right in the land they must give open and unequivocal notice of their intention to the landholder. Nor does the mere non-payment of rent for a number of years amount to such notice since when a land has been encroached upon gradually and secretly the very fact of its being occupied may very well escape notice.

Appeal against the decree of the District Court of Ganjam in A. S. No. 80 of 1934 preferred against the decree of the Court of the Sub-Collector of Berhampore Division in O. S. No. 21 of 1933.

T. R. Venkatarama Sastri and *T. V. Rajagopalan* for Appellant.

B. Jagannadha Das for Respondents.

The judgment of the Court was delivered by

Stodart, J.

Stodart, J.—This second appeal arises out of a suit for rent under S. 77 of the Estates Land Act by the Zamindar of Bodo Khenidi. The suit proceeded on the footing that the land for which rent was claimed was S. No. 532 of Godogovindpur a village in the plaintiff's zamindari. The defendants are (1) a goldsmith of Godogovindpur, (2) a Brahmin describing himself as an inamdar of the neighbouring village on the west called Pattigovindpur which is outside plaintiff's zamindari, and (3) a Komati of Naupada, a village in the plaintiff's zamindari. The first defendant filed a written statement, which was adopted by the second and third defendants claiming that the field was an enfranchised pre-settlement inam land, that the first and third defendants had bought separate portions from the inamdars, and that the land formed part of Pattigovindpur village. It

* S. A. No. 832 of 1935. 24th August, 1939.

Rama-chandra Deo v. Kamoju Balaji.

Stodart, J.

was also claimed that the defendants had held the land for long over the statutory period without paying rent to the zamindar.

[After an elaborate discussion of the facts on evidence His Lordship proceeded.]

On appeal three points are urged on behalf of the respondents. First, that the suit land although situated inside the limits of Godogovindpur is nevertheless part of the whole inam village of Pattigovindpur. This as we have said was never pleaded, much less proved. We have already said more than once that the defendants claimed the suit land as lying within the village of Pattigovindpur. Then it is urged that the learned District Judge was right in his finding that the defendants had held the land adversely to the plaintiff for more than twelve years. We have already stated that there is no evidence at all of this. Lastly, it is urged that having been in possession for more than twelve years without paying rent, the defendants cannot now be called on to pay rent. And this is the only point of law which arises for decision in this appeal. We are not prepared to hold on the evidence that the defendants or their predecessors were in possession for over twelve years without paying rent, but assuming that they were, we think that they did not prevent the zamindar from levying rent when he came to know of the occupation of the land. Jeroyati or ryoti land is land in a zamindari in which the tenant has occupancy rights as defined in the Estates Land Act (I of 1908). A ryot who has been let into possession by the landholder or whose possession is recognised by the landholder is called an occupancy ryot and has large rights, the chief of which is that he cannot be evicted except on the ground that he has rendered his holding substantially unfit for agricultural purposes (*see* S. 151). A ryot who has not been let into possession by the landholder or who has not acquired the occupancy right by inheritance or transfer is a non-occupancy ryot. And he too has valuable rights and privileges under the Act. He may make improvements on the land without the landholder's consent (S. 14). He is not liable to pay rent for the land in excess of the rent fixed on the land or if no rent is fixed then a fair and equitable rent decided by the Collector (S. 45). And finally he can compel the landholder to grant him a permanent right of occupancy on tendering as premium a sum equal to two and a half times the rent of the land and the landholder is

debarred for twenty years thereafter from enhancing that rent (S. 46). It is only when the provisions of Ss. 45 and 46 have not been complied with that the landholder has the right to evict a non-occupancy ryot by a suit in a Civil Court (S. 163). On the other hand the non-occupancy ryot must of course pay rent (S. 45) and the rent can be recovered from him by suit in the Collector's Court (S. 77) and he can be evicted if he fails to discharge a decree for rent within a certain time, by suit filed in the Collector's Court (S. 153). But there is nothing in the Act which enables the non-occupancy ryot to prescribe for title to hold the land free of rent. And having regard to the conditions prevailing in zamindaries it would be surprising if there were any such provision. For in the majority of cases these estates are not surveyed. There is no demarcation of the holdings of the various ryots on the ground. There is no survey map by reference to which the holdings can be located. The recorded area of the land in the landholder's books is not based on exact measurements nor calculated with mathematical precision. It is easy therefore for a ryot to encroach gradually on unoccupied land adjacent to his holding and the encroachment may pass unnoticed for years. It would be a vexatious burden on the landholder if he were debarred from claiming rent on such encroachments as soon as he detected them.

It was somewhat faintly argued by learned Counsel for the defendants that if the defendants believed that they had the full ownership of the land—which in itself is a large assumption—and enjoyed it as such for over the statutory period, that in itself is sufficient to give them a title by prescription against the zamindar. We cannot concur in this argument. Adverse possession in order to become a basis of title must be brought to the notice of the true owner. Here, if, for the sake of argument, we grant that the defendants actually were on the land for over twelve years before suit—and the evidence of that is not conclusive either—such occupation did not affect the landholder with notice of their claim to be proprietors. For in a zamindari, as it is hardly necessary to point out, the major portion of the land is in the occupation of persons who have the right to occupy it but not the whole proprietary right; who are, in other words, occupancy ryots or persons who hold the land in the hope of being occupancy ryots. If such persons wish to prescribe for a higher right in the land they must give open

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and unequivocal notice of their intention to the landholder. Nor does the mere non-payment of rent for a number of years amount to such notice since, as we have pointed out, when a land has been encroached upon gradually and secretly the very fact of its being occupied may very well escape notice.

In the result we differ from the lower Court. We find that defendants did not prescribe for title as proprietors for the simple reason that they never asserted any such title. And we find that by non-payment of rent for more than twelve years—assuming that such is the fact—they did not prescribe for the right to enjoy the land for ever without paying rent. We allow this appeal and set aside the decrees of the Courts below. The appellant will have his costs of this appeal and of the suit throughout.

K. C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KUNHI RAMAN.

Messrs. Ahmad Bux Alla Jovaya .. *Appellants** (*Defendants*)

v.

Fazal Karim .. *Respondent* (*Plaintiff*).

Ahmad Bux Alla Jovaya *v.* Fazal Karim.

Contract—Offer and acceptance—Counter-offer by purchaser—Acceptance of seller by telegram—Rejection by purchaser on quality of goods being found inferior—Suit by seller for damages—Cause of action if in part arising where goods had to be despatched—Letters Patent, cl. 12.

Where the appellants, a firm, carrying on business in Hyderabad, Sind, telegraphed to respondents doing business at Madras and Madavaram, offering to sell them goods of which delivery was to be given at the Railway station at Hyderabad, but on a counter-offer from the respondent a different price was accepted by telegram by the appellants but the goods were rejected by the respondents at Madhavaram, and the appellants denying the quality of the goods to be inferior as alleged by respondents, filed a suit on the Original Side of the High Court of Madras,

Held, that part of the cause of action did not arise in Madras by reason of the fact that the respondent sent from Madras his offer by telegram.

Clarke Brothers v *Knowles*, (1918) 1 K.B. 128 and *The National Insurance Co., Ltd., Calcutta* v. *Seethammal*, (1933) 65 M.L.J 455, followed.

Engineering Supplies, Ltd. v. *Dhandhania & Co.*, (1930) I.L.R. 58 Cal 539, dissented from.

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* O. S. A. No. 48 of 1938 8th August, 1939.

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The posting of an offer or the despatch by telegram of an offer from a particular place cannot be regarded as part of the cause of action. The making of an offer has to be proved in order to entitle a plaintiff to succeed in such a case as this, but the offer is made at a place where it is received and if it is made by post or telegram the place of despatch is not a material factor.

The rejection does undoubtedly form part of the cause of action, but if the place of rejection is material, it was not at Madras, but at Madhavaram where goods were sent for examination. The fact that the respondent communicated his decision to reject from Madras did not make Madras the place of rejection. The place of rejection was not material. In order to succeed, the respondent had not to show where he rejected the goods, but that he was entitled to reject them because they were not of contract quality.

On appeal from the judgment and order of the Hon'ble Mr. Justice Gentle dated 22nd April, 1938 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 219 of 1937—Application No. 43 of 1938.

B. Pocker for Appellants.

K. N. Viswanathan for Respondent.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—The question raised in this appeal is whether a cause of action arose in part within the original civil jurisdiction of this Court. The appellants are a firm of hide merchants carrying on business in Hyderabad, Sind. On the 21st April, 1937, the appellants telegraphed to the respondent, who is a merchant carrying on business at Madras and at Madhavaram, offering to sell him 5,000 sheep hides of a certain quality at the price of Rs. 128 per 100 skins, delivery to be given at the railway station in Hyderabad. The respondent by a telegram of the same date made a counter-offer. He informed the appellants that he was prepared to accept the hides at the price of Rs. 125 per 100 skins. This counter-offer was accepted by the appellants by telegram the next day. On the 4th May, 1937, the appellants made an offer to the respondent in respect of another parcel of hides but of a different quality at the price of Rs. 80 per 100 skins. Here again, the respondent made a counter-offer. On 5th May he telegraphed saying that he was prepared to buy at the price of Rs. 75 per 100 skins. This counter-offer was accepted by the appellants by a telegram despatched from Hyderabad on the 7th May. The prices given were for Hyderabad railway station and therefore the respondent under the terms of the contract was bound to take delivery at Hyderabad. This was not convenient and at the respondent's request the goods were forwarded to

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Madras *via* Karachi through a firm of forwarding agents. The arrangements in this connection must be taken to be the arrangements of the respondent. Both consignments duly arrived in Madras and were taken by the respondent to his tannery at Madhavaram, where they were unpacked and inspected. The respondent considered that the goods were of inferior quality and he decided to reject them, which he did by a letter posted from Madras. The appellants denied that the goods were of inferior quality and refused to take them back. The result was that a suit was filed on the Original Side of this Court by the respondent for damages for breach of contract.

In the plaint the respondent averred that part of the cause of action arose in Madras:

"where the offers were made, wherefrom the sum of Rs. 7,500 was remitted to the defendants and the breach of the condition of the goods was ascertained and the goods were rejected."

Under cl. 12 of the Letters Patent the Court has jurisdiction to try a suit in which the cause of action partly arises within the local limits of the ordinary civil jurisdiction of the Court, provided leave is first obtained. The respondent applied for and obtained leave to file the suit. The appellants, having been served with the summons, asked for the revocation of the order granting leave. The application was heard by Gentle, J., who rejected it. The appeal now before us is from that order. The learned Judge held that the case fell within the decision of the Calcutta High Court in *Engineering Supplies, Ltd.* v. *Dhandhania & Co.*[1], which he considered was not in conflict with the decisions of this Court in *The National Insurance Co., Ltd., Calcutta* v. *Seethammal*[2] and *Kamisetti Subbiah* v. *Katha Venkataswamy*[3]. As I do not share the opinion that the decisions of the two Courts are in harmony it will be necessary to examine these cases, but before doing so, I consider it desirable to refer to two English decisions which have bearing on the appeal.

The first of these cases is *Read* v. *Brown*[4], in which the Court of appeal (Lord Esher and Fry and Lopes, L. JJ.) defined "cause of action" as comprising every fact, which if traversed, it is necessary for a plaintiff to prove to entitle him to succeed. This definition has found general acceptance. The second case

1. (1930) I.L.R. 58 Cal. 539. 2. (1933) 65 M.L.J. 455.
3. (1903) I.L.R. 27 Mad. 355. 4. (1889) 58 L.J.Q.B. p. 120.

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is *Clarke Brothers* v. *Knowles*[1], in which it was held that where a contract is made by an offer and acceptance sent through the post between parties residing in different County Court districts the posting of the offer is not part of the cause of action within the meaning of S. 74 of the County Courts Act. That section corresponds with cl. 12 of the Letters Patent of this Court. Under it an action or matter may be commenced by leave of the Judge or registrar in the Court in the District of which the action or claim "wholly or in part arose." In that case the plaintiffs, who carried on business at West Hartlepool bought from the defendant, who carried on business at Croydon, a quantity of glass and scrap wire. The contract was made entirely by correspondence through the post. The defendant failed to deliver the goods and the plaintiffs instituted a suit in the West Hartlepool County Court, having first obtained leave under S. 74 of the County Courts Act. It was contended by the plaintiffs that inasmuch as their offer which the defendant accepted was made in a letter posted in West Hartlepool part of the cause of action arose there. Lawrence and Lush, JJ., were emphatic in their opinion that the posting of the offer was no part of the cause of action. Lawrence, J., said:

"The making of an offer is part of the cause of action, but an offer is made where it is received, and that in this case was at Croydon."

The words of Lush, J., were:

"The material question is not where the offer was sent from but where it was made, and the making of the offer is proved by showing that it was received."

I will now turn to the decisions of this Court referred to by Gentle, J. In *The National Insurance Co., Ltd., Calcutta* v. *Seethammal*[2], the question for decision was whether a contract of insurance had been effected in Madras or in Calcutta. The proposal for a policy was made in Madras through a local agent who had no power to accept it. It could only be accepted at the office of the Insurance Company in Calcutta. The proposal for the policy was posted from Madras and it was contended that the contract must therefore be deemed to have been made here. The Court negatived this contention and relying on *Clarke Brothers* v. *Knowles*[1], held that an offer made through post is made in the place where the offer is received.

1. (1918) 1 K.B. 128.
2. (1933) 65 M.L.J. 455.

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The case of *Kamisetti Subbiah* v. *Katha Venkataswamy*[1] was one under the Code of Civil Procedure, 1882, and is not really in point. Under that Code a suit had to be filed in the Court within whose jurisdiction the cause of action arose; or, all the defendants at the time of the commencement of the suit, actually and voluntarily resided, or carried on business, or personally worked for gain; or any of the defendants, at the time of the commencement of the suit, actually and voluntarily resided, or carried on business, or personally worked for gain: provided that in the last case the leave of the Court was given, or the defendants who did not reside, or carry on business or personally work for gain, acquiesced in the institution of the suit. There were three explanations to the section. The third explanation stated that in suits arising out of contract, the cause of action arose within the meaning of the section at the place where the contract was made, or the place where the contract was to be performed or performance thereof completed, or the place where in performance of the contract any money to which the suit related was expressly or impliedly payable. The corresponding section in the present Code, S. 20 follows the lines of the Letters Patent and says that a suit shall be instituted in a Court within the local limits of whose jurisdiction the cause of action, wholly or in part arises. It was held in *Kamisetti Subbiah* v. *Katha Venkataswamy*[1], that the contract was made in Madras, where the plaintiff's proposal—sent by post—came to the knowledge of the defendants and where the defendant's acceptance was posted. What the Court had to decide was where the cause of action arose, not whether it arose partly in one place and partly in the other, and on the facts of the case it came to the conclusion that it must be deemed to have arisen in Madras.

The question in *Engineering Supplies, Ltd.* v. *Dhandhania & Co.*[2] was whether the Calcutta High Court had jurisdiction to try a suit for breach of contract made between a Calcutta merchant and an English company for the supply of goods. The offer was made by cablegram to London from Calcutta and accepted by cablegram from London. In accordance with the terms of the contract the goods were sent to Calcutta, but they were rejected because they were said not to be of the specified quality. It was held by Rankin, C.J. and Ghose, J., that the

1. (1903) I.L.R. 27 Mad. 355.
2. (1930) I.L.R 58 Cal. 539.

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Calcutta High Court had jurisdiction to try the suit as part of the cause of action arose therein. The respondent in the present case has laid great stress on the following passage in the judgment of Rankin, C.J.:

"There remain two matters on which the plaintiff can rely in contending that a part of the cause of action took place in Calcutta. One is that his offer was sent from Calcutta by a cable to London, and the other is that he rejected the goods which he did by sending the defendants a communication from Calcutta or by informing their representative in Calcutta."

The learned Chief Justice did regard the making of the offer by cable from Calcutta as part of the cause of action and the rejection of the goods in Calcutta as also a part of the cause of action. There is only one common factor in that case and the case now before us and that is that the suit was instituted in the place from which the accepted offer was sent. The other facts are very different. The contract in the Calcutta case was a C.I.F. contract under which the goods had to be delivered in Calcutta. In the present case the contract is a F.O.R. contract under which the sellers were bound to deliver only at the Hyderabad railway station. I may say in passing that in the present case we have only been asked to hold that the Court has jurisdiction because the offers were made from here and the goods were rejected from here. No point has been made of the fact that money was remitted from here to Hyderabad in payment of the goods.

With the greatest respect for what was said in *Engineering Supplies, Ltd.* v. *Dhandhania & Co.*[1], I am unable to agree that the posting of an offer or the despatch by telegram of an offer from a particular place can be regarded as part of the cause of action. The making of the offer has to be proved in order to entitle a plaintiff to succeed in such a case as this, but the offer is made at the place where it is received and if it is made by post or telegram the place of despatch is not a material factor. The case of *Clarke Brothers* v. *Knowles*[2], apparently was not considered in *Engineering Supplies, Ltd.* v. *Dhandhania & Co.*[1] As I have indicated, it was considered and accepted in *The National Insurance Co , Ltd., Calcutta* v. *Seethammal*[3] and that being a decision of a Bench of this Court is binding on us. For the reasons indicated I hold that part of the cause of action in

1. (1930) I.L.R. 58 Cal. 539. 2. (1918) 1 K.B. 128.
3. (1933) 65 M.L.J. 455.

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this case did not arise in Madras by reason of the fact that the respondent sent from here his offers by telegram.

The only other point to be considered is with regard to the rejection of the goods. The rejection does undoubtedly form part of the cause of action, but if the place of rejection is material it was not at Madras. It was at Madhavaram where the goods were sent for examination. The respondent had to communicate his decision to the appellants but the fact that he did so through a letter posted in Madras did not make Madras the place of rejection. The notice of rejection must on the authority of *Clarke Brothers* v. *Knowles*[1], be taken to have been given in Hyderabad where the letter was received. In my opinion the place of rejection was not material. In order to succeed the respondent has not to show where he rejected the goods, but that he was entitled to reject them because they were not of contract quality.

It follows that in my judgment the cause of action did not arise even in part in Madras and consequently the Court has no jurisdiction to try the suit. In these circumstances the appeal must be allowed and the permission to sue in this Court revoked. The plaint will accordingly be taken off the file of the Original Side. The appellants are entitled to their costs here and below.

Kunhi Raman, J.

Kunhi Raman, J.—I agree with my Lord.

K. C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Puliyath Govinda Nair .. *Petitioner** (*Plaintiff*)

v.

Parekalathil Achutan Nair .. *Respondent* (*Defendant*).

Govinda Nair v. Achutan Nair.

Indian Contract Act (*IX of 1872*), *S. 25* (*3*)—*Promise to pay portion of barred debt—If provides good cause of action for whole debt.*

If a person promises to pay only a portion of the debt which is barred by limitation he can only be sued for that portion alone and not for the whole debt. In the absence of an express promise to pay the portion of the debt sued for it cannot be recovered.

1. (1918) 1 K.B. 128.

* C. R. P. No. 269 of 1937. 2nd February, 1940.

Govinda Nair v. Achutan Nair.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Ootapalam in S.C.S. No. 322 of 1936.

P. Govinda Menon for Petitioner.

N. R. Sesha Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—A suit was instituted by the petitioner for the recovery of Rs. 288 and odd, being the price of paddy alleged to have been due by the respondent's brother and verbally agreed to be paid by the respondent. The lower Court found in favour of the agreement but refused to give effect to it as it was held to be without consideration. The plaintiff has consequently come up in revision.

It may not be quite correct to say that the agreement between the parties to the suit was without any consideration. The agreement by the plaintiff to release the defendant's brother from liability—if it was legally enforceable at the time when the agreement was said to have been reached—was quite a good consideration for the new agreement between the parties to the suit. But if the plaintiff's claim against the defendant's brother was barred by limitation on the date on which this agreement was arrived at and the contract was not reduced to writing as required by S. 25 (3) of the Indian Contract Act, it would remain unenforceable. Mr. Govinda Menon contends, however, that this section has no application to an agreement which was entered into between the parties to the present suit but must be confined in its operation to the agreement arrived at between the original parties thereto, if attempted to be enforced by the original creditor against the original debtor. S. 25 of the Indian Contract Act, so far as it is relevant to the present case, reads as follows:—

> "An agreement made without consideration is void unless it is a promise made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised on that behalf, to pay, wholly or in part, a debt of which the creditor might have enforced payment but for the law for the limitation of suits."

The words "by the person to be charged therewith" are wide enough to cover the case of a person who agrees to become liable for the payment of a debt due by another and need not be limited to the person who was indebted from the beginning. This difficulty seems to have been recognised on behalf of the plaintiff and a letter Exhibit C was produced by him at

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the trial. This was written by the defendant on the 20th May, 1933, to the plaintiff asking him to come and receive 50 paras of paddy "towards what was to be given to" him. A perusal of this letter shows that although it contained a definite request to receive 50 paras of paddy, yet there was nothing in it which could be said to disclose an express promise to deliver the remaining paddy; and in the absence of an express promise, this letter cannot be held to comply with the requirements of the section. The promise referred to in S. 25, sub-cl. 3 of the Indian Contract Act must be an express one and cannot be held to be sufficient if the intention to pay is unexpressed and has to be gathered from a number of circumstances. In other words there must be a distinct promise to pay before the document can be said to fall within the provisions of this section. (See *Ramaswami Pillai* v. *Kuppuswami Pillai*[1], *Gobind Das* v. *Sarju Das*[2], *Maniram Seth* v. *Seth Rupchand*[3] and *Mukhi Lal* v. *Gul Muhammad*[4].) Reliance was placed by the learned counsel for the petitioner on *Appa Rao* v. *Suryaprakasa Rao*[5] and *Maidens Hotel, Delhi* v. *Willnott*[6], but they do not bear out his contention. It was held in the first case that a document sufficiently complies with S. 25 of the Contract Act if an intention to pay a debt wholly or in part has been expressed therein in such a way as to constitute a promise and the debt is sufficiently identifiable although the amount promised to have been paid remained unstated. This is not the same thing as saying that the promise to pay the debt need not have been expressed or that an implied promise was enough for the purposes of this section. The Lahore case lays down nothing more than that a letter containing a promise to pay a debt which was barred by the law of limitation is itself an agreement enforceable in law. This follows directly from the language of the section but renders no assistance to the petitioner's case.

It was then urged by Mr. Govinda Menon that the express promise to pay a portion of the debt due was quite enough to bring the case within S. 25 (3) and that after such a promise not only could the portion of the debt so promised be sued for, but that it provided a good cause of action even in regard to

1. (1910) M.W.N. 547. 2. (1908) I.L.R. 30 All. 268.
3. (1906) 16 M.L.J. 300: L.R. 33 I.A. 165: I.L.R. 33 Cal. 1047 (P.C.).
4. A.I.R. 1933 Lah. 209.
5. (1899) 9 M.L.J. 330: I.L.R. 23 Mad. 94.
6. A.I.R. 1935 Lah. 984.

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the portion for which there was no express promise in the document. The contention that if a person promises to pay a part of the debt, he should be taken to have promised to pay the whole of the debt has, in my opinion, no substance. If a person promises to pay a portion of a barred debt, he can only be sued for that portion alone and not for the whole debt. If, on the other hand, he promises to pay the whole of the barred debt in writing he could be sued for the whole of the debt. Illustration (*e*) given in the section would show what the Legislature really meant by the use of the words "wholly or in part of the debt." If the contention raised by Mr. Govinda Menon were accepted it would lead to startling results. If a person promises to pay only a portion of the debt which is barred by limitation, he would according to Mr. Govinda Menon's construction of the section become liable to pay the balance of the debt as well which he had not promised to pay and which apparently he had no intention to pay. This could never have been intended by the Legislature and this would be the inevitable conclusion if this contention were accepted. It must therefore be held that inasmuch as the letter Ex. C contains no express promise to pay the portion of the debt now sued for, it is of no value to the plaintiff in this suit.

In the end it was contended that there was no proof on the record that the debt in regard to which the defendant had made a promise was barred by limitation. But the plaintiff's own statement, if read in extenso, leaves no room for doubt that it was.

The result is that this revision fails and is dismissed. But having regard to the fact that the plea in regard to S. 25 (3) was not raised on behalf of the defendant specifically I will leave the parties to bear their own costs throughout.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

M. R. Ranganatha Aiyar .. *Appellant* (1st Defendant)*

v.

Jayavelu Mudaliar and another .. *Respondents (Plaintiff and 2nd Defendant).*

Ranganatha Aiyar v Jayavelu Mudaliar.

Indian Oaths Act (X of 1873), Ss. 8, 9 and 11—Claim petition under O. 21, r. 100, Civil Procedure Code (V of 1908)—Challenge to claimant to state on

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* A. A. A. O. No. 123 of 1939. 15th February, 1940.

Ranganatha Aiyar v. Jayavelu Mudaliar.

oath—Subsequent suit under O. 21, r. 103—Whether suit was barred by evidence in the earlier proceeding—Circumstances to be considered—Evidence on challenge confined to the particular proceeding.

The only proper method of interpreting S. 11 of the Indian Oaths Act is to interpret it in conjunction with Ss. 8 and 9 and that its primary meaning must be that the evidence given in any proceeding in which a challenge has been made and an oath has been taken shall be in that proceeding conclusive proof of the matter stated. It is clear from the expression 'the evidence so given'. It cannot automatically be evidence at all except in the proceeding in which it is actually being received. If there is a subsequent proceeding, then until that statement made on oath be brought into that subsequent proceeding, it cannot be considered.

Where in a claim proceeding under O. 21, r. 100, Civil Procedure Code, the decree-holder challenged the claimant to state on oath that the portion claimed by him was built by him, and oath having been taken and the claim petition ordered, the decree-holder further brought a suit under r. 103 of O. 21, which was objected to on the ground that the challenge under oath having been accepted a suit could not be filed,

Held, that it was impossible to hold that unless it was clearly present to the minds of the parties that the evidence to be given in the claim petition was in no manner to be challenged in or by a subsequent suit, an oath in these circumstances should relate to the claim proceedings themselves and to them alone.

If that evidence was challenged in a subsequent suit the burden would be on the other side to establish that the challenge was originally intended to have effect upon any possible civil suit which might be filed under r. 103.

Case-law discussed.

Appeal against the order of the District Court of North Arcot dated 12th January, 1939 and made in A. S. No. 28 of 1938 preferred against the decree of the Court of the District Munsif of Ranipet in O. S. No. 51 of 1937.

K. V. Ramachandra Aiyar for Appellant.

K. Bashyam Aiyangar and *T. R. Srinivasan* for Respondents.

The Court delivered the following

JUDGMENT.—The appellant in this appeal claims title to the western half of a certain house. The respondent was a decree-holder against a cousin of the appellant, who, according to the appellant, owned the eastern half. In execution of the decree, the respondent took delivery of the entire house. There was then an application under O. 21, r. 100 by the appellant asking the Court to redeliver to him the western half of this house. During the progress of the inquiry into that application, the respondent challenged the appellant in the following words;

"If the petitioner swears on oath that the western half of the suit house belongs to him solely and that he himself built it and at the time when the

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plaintiff went for taking delivery it was in his possession, then to the extent of the western half, the petition may be allowed."

The appellant accepted the challenge and gave evidence on special oath in the affirmative on all the three points put to him by the respondent. This oath was of course followed by the allowing of the appellant's petition. The respondent then filed a suit under r. 103 against the appellant and his brother and they took the objection that no suit would lie because of the evidence which the appellant had given on oath. This preliminary objection was upheld by the District Munsif. On appeal, the learned District Judge of Vellore found that the oath was no bar to the suit and accordingly remanded the suit for disposal after trial on the other issues. Against that order of remand, the present appeal has been filed.

The main question to be decided in this appeal is the interpretation of S. 11 of the Indian Oaths Act. S. 11 which refers to evidence given on special oath runs as follows:—

"The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated."

And the question which I have now to decide is whether this section relates to the proceeding in which the evidence was given alone or whether it relates to all possible proceedings in which the subject-matter of the evidence given on oath may be involved. In favour of the latter view is no doubt the fact that in S. 11 no specific statement is made restricting the particular proceedings in which the evidence shall be conclusive proof. On the other hand, Ss. 8 and 9 obviously refer to some *one* judicial proceeding, and it seems to me the only proper method of interpreting S. 11 is to interpret it in conjunction with Ss. 8 and 9 and that its primary meaning must be that the evidence given in any proceeding in which a challenge has been made and an oath has been taken shall be in that proceeding conclusive proof of the matter stated. This seems to me clear from the expression "the evidence so given". It cannot automatically be evidence at all except in the proceeding in which it is actually being received. If there is a subsequent proceeding, then until that statement made on oath is brought into that subsequent proceeding, it cannot even be considered.

It is however argued on behalf of the appellant that although the suit under O. 21, r. 103, may not in one sense be the same proceeding as a petition under r. 100, it is, nevertheless, a continuation of, or in the nature of an appeal from that

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form of proceeding and therefore any evidence given under the special provisions of the Oaths Act in a proceeding under r. 100 must be conclusive proof in any suit under r. 103. In support of this argument, I have been referred to a decision in *Krishnappa Chetty* v. *Abdul Khader Saheb*[1], in which it has been held that a suit of this kind is a continuation of a claim petition with regard to the doctrine of *lis pendens*. In *Krishnappa Chetty* v. *Abdul Khader Sahib*[1], an alienation which took place between the disposal of a claim petition and the institution of a suit was held to be affected by the doctrine of *lis pendens*. Again in *Phul Kumari* v. *Ghanshyam Misra*[2], the Privy Council dealing with a question of court-fee, has pointed out how a suit of this nature to set aside an order in a claim petition is in the nature of an appeal or a review and therefore, comes within a particular provision of the Court-Fees Act and is chargeable with a particular sum as court-fees. It does not seem to me that these rulings afford much guidance in the decision of the present appeal. No doubt, for some purposes, the suit which follows the order on the claim petition may be a continuation of the same proceedings but the scheme of the Civil Procedure Code itself shows that there is an essential difference between the two. The claim proceedings is in the nature of a summary proceeding which gives a provisional result, and the scope of the suit is very much wider. It seems to me impossible to hold that unless it is clearly present to the minds of the parties that the evidence which is going to be given in the claim petition is in no manner to be challenged in or by a subsequent suit, an oath in those claim proceedings must relate to the claim proceedings themselves and to them alone.

If we go back to the terms of the challenge in the present case, we find no doubt that the appellant was called upon to repeat on oath his contention that he was the owner of the western half of the suit house. It does not seem to me reasonable to argue that because the appellant was called upon to make that statement, the respondent was setting the whole question of title in issue between himself and the appellant or that the respondent had in mind a complete promise never to proceed against the appellant in the Civil Courts under r. 103.

1. (1913) 26 M.L.J. 449: I.L.R. 38 Mad. 535.
2. (1907) 17 M.L.J. 618: L.R. 35 I.A. 22: I.L.R. 35 Cal. 202 (P.C.).

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The limitation within which the challenge was made is clearly to be seen in his own words:

"That if the appellant makes the statement on oath then the petition may be allowed."

All that that means, it seems to me, is that the respondent has no objection to the appellants being put in immediate possession of the western half of the house, if he be resolute enough to restate his contentions by taking a special oath. This is in itself a very real concession and, it seems to me, that on the language of the challenge itself, all that the respondent meant was that the particular petition in which he was engaged might be decided unfavourably to himself. Of course, he has not in so many words reserved in the challenge any right to file a suit. But, it seems to me, that the burden lies upon the other side to establish that the challenge was intended to have any effect upon any possible civil suit which might be filed under r. 103. The only way in which the evidence given in the claim petition could be used to defeat the respondent seems to me to be, if the doctrine of *res judicata* were to apply to the subsequent proceeding. Obviously, in the present case, the doctrine of *res judicata* cannot apply because the order on a claim petition is specifically made subject by the provisions of the Civil Procedure Code itself to the result of a suit under S. 103 and the appellant's learned advocate did not attempt to rely upon the doctrine of *res judicata*. I am accordingly of opinion that the order of the learned District Judge remanding this suit was correct and that this appeal must fail. It is accordingly dismissed with costs.

Leave granted.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Kallumatam Gurubasayya .. *Petitioner** (*Accused*)

v.

Sanna Setra Siddalingappa .. *Respondent* (*Complainant*).

Guru-basayya v. Sidda-lingappa

Indian Penal Code (XLV of 1860), S. 193—Allegation in plaint false—Offence under S. 193—Necessity for complaint by Court—If can be evaded by party filing a complaint of defamation.

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* Crl. R. C. No. 1094 of 1939.
Crl. R. P. No. 1029 of 1939.

22nd February, 1940.

Guru-basayya v. Sidda-lingappa.

A complaint was founded on an allegation in a plaint in a suit for partition and recovery of the share of the vendor of accused in the family properties,

Held, if the allegation was false the offence would be one under S. 193, Indian Penal Code. A complaint by the Court is necessary for a prosecution for an offence under S. 193, Indian Penal Code, and the parties cannot be permitted to evade that provision of law by filing a complaint of defamation.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to quash the charge framed against the petitioner herein in C. C. No. 60 of 1939 on the file of the Court of the Sub-Divisional Magistrate of Bellary.

A. Bhujanga Rao for Petitioner.

A. Gopalacharlu for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The complaint is founded on an allegation in a plaint in a suit for partition and recovery of the share of the vendor of the accused in the family properties and if the allegation is false the offence would be one under S. 193, Indian Penal Code. A complaint by the Court is necessary for a prosecution for an offence under S. 193, Indian Penal Code and the parties cannot be permitted to evade that provision of law by filing a complaint of defamation. In this view it is unnecessary to consider whether a prosecution at this stage is not an abuse of the process of Court and the charge is quashed.

K. S. ——— *Charge quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

The Secretary of State for India in Council represented by the Collector of West Godavari .. *Appellant** (*1st Defendant*)

v.

Sree Rajah Malraju Venkata Narasimha Rao Bahadur and another .. *Respondents* (*Plaintiff and 2nd Defendant*).

Secretary of State for India in Council v. Venkata Narasimha Rao Bahadur.

Survey and Boundaries Act (*VIII of 1923*), *S. 14—Suits under by private persons as to boundaries—Survey officers if represent the Government and Government if necessary or proper parties to such suits—Right of Government to costs if impleaded.*

* S. A. Nos. 261 and 262 of 1937. 21st February, 1940.

Secretary of State for India in Council v. Venkata Narasimha Rao Bahadur.

The decisions given under the Survey and Boundaries Act are by survey officers who, though appointed by the Government in no sense represent them in their actions under the Survey and Boundaries Act. Their decisions are binding on the parties in the absence of a suit. The Government was not in the least interested in the result of the suits, for the survey officer in making his decisions acted not as an agent of the Government, but as a Statutory Officer specially empowered under the Act. The Government is neither a necessary nor a proper party to the suit and Government if impleaded is entitled to its costs from the plaintiff.

Appeals against the decrees of the Court of the Subordinate Judge of Ellore in A. S. Nos. 233 and 188 of 1936, preferred against the decrees of the Court of the District Munsif of Kovvur in O. S. Nos. 191 and 189 of 1935 respectively.

The Government Pleader (*B. Sitarama Rao*) for Appellant.

K. Kameswara Rao for Respondents.

The Court delivered the following

JUDGMENT.—These appeals arise out of suits under S. 14 of the Survey and Boundaries Act.

The position in these two suits is a very curious one. The plaintiff was the same in the two suits and, before they were actually filed, he seems to have come to some arrangement with the two second defendants; for they filed no written statement. The common first defendant was the Secretary of State; and all the issues were framed because of the written statement of the first defendant. The trial Court found that the Secretary of State was not a necessary party; and while decreeing the suits, as the second defendant in each case did not oppose, ordered that the first defendant be given his costs on the ground that he was not a necessary party.

The appeals were heard by two Judges. In A. S. No. 233 of 1936, the Judge held that the Secretary of State was not a necessary party; but that his attitude in supporting the case of the second defendant and joining issue with the plaintiff disentitled him to receive costs. He thought, moreover, that although the Secretary of State was not a necessary party, he was a proper party. In A. S. No. 188 of 1936 (S. A. No. 262 of 1937) the principal Subordinate Judge found that the first defendant was a necessary party in each case. The appeals of the plaintiff against the orders as to costs were allowed and the Government was ordered to pay its own costs in both Courts in both suits.

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The decisions given under the Survey and Boundaries Act are by Survey Officers who, though appointed by the Government, in no sense represent them in their actions under the Survey and Boundaries Act. They are Statutory Officers given statutory powers and they act in a quasi-judicial manner; and their decisions are binding on parties in the absence of a suit. The Government was not in the least interested in the result of the suit; for the Survey Officer, in making his decisions, acted not as an agent of the Government, but as a Statutory Officer specially empowered under the Act. The learned principal Subordinate Judge in A. S. No. 188 of 1936 says:

> "If the Government is not a party to the proceeding, I do not think any order passed by a Civil Court may be binding (on the Government)"

and, later "it is the Government that demarcates the survey numbers". This is incorrect. It is not the Government that makes the survey; but a Survey Officer specially empowered by the Statute. Clearly, the lower appellate Court was wrong in thinking that the Government was a necessary party. For the same reasons, the Government is not a proper party. The dispute was between—and only between—the two persons interested in the common boundary. Upon the decision of the Civil Court, the Survey authorities would have to make the necessary changes in their registers.

It is not denied in this Court that the Government was neither a necessary nor a proper party. The orders of the lower appellate Courts are however supported on the ground that Government, instead of contenting itself with merely stating that it was not a necessary party, tried to uphold the finding of the Survey Officer. The Government says in paragraph 1 of its written statement in each case:

> "The allegations in the plaint are not true and this defendant puts the plaintiff to strict proof of all the allegations that are not expressly admitted herein."

Then, in para. 5:

> "The allegation that the second defendant encroached upon the suit lands after the inclusion of the suit lands, in his adjoining land is also alsolutely false. But this defendant submits that the second defendant and his ancestors were in possession of the suit land even prior to the block survey."

The first paragraph set out above may be excused on the ground that allegations were made in the plaints that the changes were brought about by the collusion of the second defendant

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with the village officers. But even if it were true that some collusion had taken place, the Government would still not have been either a necessary or a proper party, as no relief was asked against the Government by way of damages or otherwise. Para. 5 cannot be defended in any way. The Government certainly should have adopted a neutral attitude on this point. However, although the Government adopted an attitude which was not strictly neutral and adopted pleas which were beyond what were directly necessary for the defence of their own subordinates; yet the primary responsibility for raising all these various issues was upon the Court. In fact, the District Munsif should at the outset have realised that the first defendant was not a necessary party; and if he had done that, no issue would have been framed. If there had been any doubt about it, the question whether the first defendant was a necessary party could have been raised as a preliminary issue. However that may be, even if the learned Munsif had any discretion in disallowing the costs of the first defendant on the ground that he had raised pleas which were not necessary, he did not do so. The lower appellate Courts, for reasons which I have held to be wrong, considered that the first Court should have disallowed the first defendant's costs. If the trial Court had a discretion, it exercised it in favour of the first defendant; and there are no sufficient grounds for interfering with that discretion.

The appeals are therefore allowed with costs and the first defendant given its costs in all three Courts. Advocate's fee one set in this Court.

K. S. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Kannomkot Kelu Kurup .. *Appellant** *(Plaintiff)*

v.

Cheriyath Manayil Paru Amma .. *Respondent (1st Defendant)*.

Kelu Kurup v. Paru Amma.

Transfer of Property Act (IV of 1882), Ss. 76 and 77—Usufructuary mortgage of kushikanom rights—Mortgagee not paying rents—Decree for rent unenforceable by lapse of time—Unpaid rent—How to be adjusted.

There was a usufructuary mortgage of kuzhikanom rights. The mortgage provided that out of the rents and profits the rent payable to the *jenmi* should

*S. A. No. 550 of 1936. 17th October, 1939.

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be paid every year and the balance should be appropriated in lieu of interests on the principal. The rent fell into arrears and the jenmi obtained a decree for possession with rents due. The decree was not executed and became unenforceable owing to lapse of time. In a suit by the successor in interest of the mortgagor,

Held, that the mortgagor is entitled to claim an adjustment of the unpaid rents due to the *jenmi* against the mortgage amount.

Immani Seshayya v. *D. Lakshminarasimha Rao Pantulu*, (1929) 57 M.L.J. 800, relied on.

Case-law discussed.

Appeal against the decree of the District Court of North Malabar in A. S. No. 119 of 1935 preferred against the decree of the Court of the District Munsif of Payoli in O. S. No. 731 of 1933.

C. S. Krishnamurthi Aiyar for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The main question for decision in this appeal is a short one and it arises on a few undisputed facts. The appellant as the successor in interest of the mortgagor sued the respondent in whom the mortgage right has become vested for redemption of an usufructuary mortgage of Kuzhikhanam rights in the suit paramba. The mortgage, marked Ex. A in the case, was executed on 25th January, 1894 and it provided that out of the rents and profits of the paramba, the purapad (rent) payable to the jenmi should be paid every year and the balance should be appropriated in lieu of interest on the principal money. The mortgagee not having paid the rents due to the jenmi according to the stipulation in the deed, the latter brought a suit in 1909 against the predecessors-in-interest both of the appellant and of the respondent herein and obtained a decree for possession of the property with the rents due. This decree, however, was not duly executed and has now become unenforceable owing to lapse of time.

The contention of the respondent is that the appellant is not entitled to claim an adjustment of these unpaid rents due to the jenmi against the mortgage amount and compensation for improvements payable by the appellant as a condition of redemption, as the benefit of the non-payment of these rents, which have now become irrecoverable should go to him, the appellant being only entitled to be kept indemnified against the claims of the jenmi. This contention was rejected by the trial

Court, but was upheld by the learned District Judge on appeal and is urged again before me on behalf of the respondent.

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It is not disputed that the question has to be decided with reference to the provisions of Ss. 76 and 77 of the Transfer of Property Act. S. 76 so far as it is material here provides:

"When during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property.........(*h*) his receipts from the mortgaged property shall, after deducting the expenses properly incurred for the management of the property and the collection of rents and profits and other expenses mentioned in cls. (*c*) and (*d*) and interest thereon be debited against him in reduction of the amount, if any, from time to time, due to him on account of interest and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage money; the surplus if any, shall be paid to the mortgagor."

S. 77 says:—

"Nothing in S. 76, cls. (*b*), (*d*), (*g*) and (*h*), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money or in lieu of such interest and defined portions of the principal."

It is perfectly clear that, by virtue of these provisions, the mortgagee is under a statutory obligation to apply the net receipts from the mortgaged property in reduction of the interest due to him and the surplus, if any, in reduction of the principal money and this obligation is excluded only if and in so far as, there is a contract between the parties that such receipts shall be taken in lieu of interest on the principal money or in lieu of interest and portions of the principal as the case may be. The principle underlying these provisions, is, of course, that the usufruct of the mortgaged property represents mortgagor's money in the hands of the mortgagee for which he is bound to account at the time of redemption, except to the extent to which he is expressly authorized to appropriate such usufruct towards interest due to him or towards interest and principal, if any surplus is left after meeting the interest. In the present case, the contract between the mortgagee and the mortgagor provides that rent payable by the mortgagor to the jenmi should be paid by the mortgagee out of the receipts from the mortgaged property and the balance should be taken in lieu of interest on the principal money. To the extent, therefore, of the receipts not paid to the jenmi as rent according to the stipulation in the deed, S. 77 cannot operate to exclude the statutory liability to account which S. 76 (*h*) casts on the respondent as the mortgagee in possession. This principle was recognised in *Immani Seshayya*

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v. D. *Lakshminarasimha Rao Pantulu*[1]. In that case the annual profits from the mortgaged property was estimated to be Rs. 240 out of which the mortgagee was required annually to pay Rs. 100 for revenue and village expenses, Rs. 60 to the mort gagor and appropriate the balance Rs. 80 towards the mortgage debt. The deed also provided that after the debt was discharged in 55 years in the manner set forth, the creditor was to surrender possession of the land to the borrower. After a certain period, the annual payment of Rs. 60 was never made to the representative in interest of the mortgagor. In a suit for redemption before the expiry of 55 years, the question arose whether the unpaid sums of Rs. 60 should have been adjusted as they fell due against the mortgage debt in which case, the mortgage debt would have been completely discharged by the time the suit was brought, or whether the mortgagor's only remedy was to recover such unpaid amounts separately, that is, otherwise than in connection with the mortgage transaction, in which case the mortgage would still remain outstanding. The learned Judges held that the unpaid sums of Rs. 60 as they fell due every year should be taken as adjusted against the mortgage debt, and observed:

"A portion (Rs. 60) was by agreement of parties excluded from the usufruct for a specific purpose. If the purpose failed or the term was not carried out, what was the result? The part excluded reverted without any further act or agreement and became again profits. The mortgagee would then be liable to apply it in reduction of the debt. S. 76 (*h*) enacts that the mortgagee should apply the usufruct, first in reduction of the interest, then of the principal. This, he is bound to do under the law; so that, if a part of the profits initially excluded was not applied as directed, it became usufruct as a matter of course and without a special contract to that effect. The proper way then of viewing the question, is: has the part excluded, in the events that have happened, regained its character of rents and profits? If so the mortgagee has no option but to appropriate it to the mortgage debt."

They reinforced their conclusion by putting an illustration which, in substance, is the present case:

"Let us suppose that the revenue on this land had been remitted by the Zamindar and the sum representing that revenue had annually been left in the hands of the defendant. Can it be successfully maintained that it is not a part of the usufruct, which the mortgagee was bound to adjust, against the mortgage debt? Clearly not. The same principle applies to the facts of the case."

The respondent's learned Counsel attempted to distinguish the decision on the ground that the mortgagee had agreed to pay the mortgagor Rs. 60 whereas all that the mortgagee in the

1. (1929) 57 M.L.J. 800.

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present case undertook to do was to pay rent due to the jenmi out of the usufruct. I am unable to see how this difference affects the principle on which that decision was clearly based. In fact, the illustration which the learned Judges used in support of their conclusion clearly shows that the principle should apply *a fortiori* to a case like the present.

The learned Counsel for the respondent placed reliance in support of his contention on certain decisions, namely, *Izzat-un-nissa Begum* v. *Pratab Singh*[1], *Fakir Muhammad Khan* v. *Ali Sher Khan*[2], *Raghubar Narain Chowdhuri* v. *Mohit Narain Jha*[3] and *Pandit Bachchu Lal* v. *Chowdhri Syed Mohammad Mah*[4].

The facts of the first of these cases were entirely different and no question arose with reference to Ss. 76 (*h*) and 77. A mortgagee decree-holder purchased the mortgaged property subject to earlier encumbrances thereon and it turned out subsequently that these encumbrances were unenforceable. The mortgagor thereupon sued to recover from the purchaser the amount of those encumbrances as unpaid purchase money and it was held by their Lordships of the Privy Council that he had no right to recover those amounts as all that he was entitled to was an indemnity against the incumbrances affecting the land.

I am clearly of opinion that this principle cannot apply to the facts of the present case which has to be decided with reference to the statutory provisions referred to above. Indeed, even in the case of vendor and vendee, it has been held by this Court, in *Raghunatha* v. *Sadagopa*[5], that the principle of the above decision will not apply if the vendee agrees to pay a certain sum of money for the land sold to him and undertakes to pay a portion thereof to the encumbrancers on behalf of the vendor. In such a case, the purchaser is regarded as agreeing to pay to the encumbrancers moneys belonging to the vendor but left with him (the vendee) to make the payment as agent of the vendor. See also *Venkatarayudu* v. *Ramakrishnayya*[6].

Fakir Muhammad Khan v. *Ali Sher Khan*[2] is the decision of a single Judge, Griffin, J., of the Allahabad High Court. The case, no doubt, resembles the present one on the facts and does support the contention of the respondent, but no reference is

1. (1909) 19 M.L.J. 682: L.R. 26 I.A 203: I.L.R. 31 All. 583 (P.C.).
2. (1911) 10 I.C. 113.
3. (1927) I.L.R. 7 Pat. 44.
4. (1933) 37 C.W.N. 457 (P.C.).
5. (1911) 21 M.L.J. 983: I.L.R. 36 Mad. 348.
6. (1937) 2 M.L.J. 307.

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made to Ss. 76 and 77 of the Transfer of Property Act and all that is referred to by way of authority for the view taken was a previous unreported decision of that Court. With all respect to the learned Judge, I think the decision is open to question and I am unable to follow it.

In *Raghubar Narain Chowdhuri* v. *Mohit Narain Jha*[1], there was a term in the usufructuary mortgage deed that all profits from increased income should go to the mortgagee and this was particularly stressed by James, J., who observed:

"The mortgage bond specifies a sum of Rs. 91-15-0, as the annual income which the mortgagees may expect to derive from the property; but it is expressly provided that any income in excess of this shall go to the mortgagees in possession and that the mortgagors will have no concern with it. Mr. Pugh contends on behalf of the appellants that the assignee of the equity of redemption is not concerned to know how the mortgagees applied their annual profits, provided that no additional liability was thereby cast upon the mortgagors."

The decision therefore appears to proceed on an express term in the mortgage bond there in question. Though S. 77 of the Transfer of Property Act was referred to in the opening sentence of the judgment as reported, there is no discussion either of that section or of S. 76 (*h*) to show how the conclusion arrived at is in accord with those provisions, and the decision in *Fakir Muhammad Khan* v. *Ali Sher Khan*[2], was merely followed.

In *Pandit Bachchu Lal* v. *Chowdhri Syed Mohammad Mah*[3], there was a provision in the mortgage deed that the mortgagee shall appropriate the surplus profits towards interest:

"The mortgagors having no claim for profits and the mortgagee having no claim for interest"

and it was held that the case fell within S. 77 and the mortgagee was not liable to account for the rents and profits. This decision has clearly no application to the present case.

Two subsidiary questions were also raised by the respondent's counsel; first, that the claim of the appellant for the back rents payable to the jenmi should be treated as a claim to set-off and that only so much of it as is not barred by limitation should be allowed; secondly, in any case, no interest should be allowed on these arrears. Both these contentions are, however, answered by the decision in *Kanna Pisharodi* v.

1. (1927) I.L.R. 7 Pat. 44. 2. (1911) 10 I C. 113.
3. (1933) 37 C.W.N. 457 (P.C.).

Kombi Achani, where it is pointed out that a claim of the kind put forward by the appellant cannot properly be described as a set-off and that in taking accounts in such cases, interest on both sides should be allowed. It is a matter of adjustment in the taking of accounts in the redemption action—*vide* the last paragraph of S. 76 of the Transfer of Property Act. Kelu Kurup *v.* Paru Amma.

For the reasons indicated, the decree of the lower appellate Court is set aside and that of the Court of the District Munsif restored. Interest at 6 per cent. per annum on future unpaid rent will be allowed till delivery of possession. The appellant will have his costs here and in the lower appellate Court. This will be subject to such orders as may be passed in C. M. P. No. 3694 of 1939 which will be sent to the trial Court for disposal.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE ABDUR RAHMAN.

Rajah Tadakamalla Seetharamachandra Rao Bahadur, Zamindar of Bethavole, South Vinagadapa, etc., Nizam's Dominions .. *Appellant** (*Plaintiff*)

v.

Sree Rajah Kotagiri Satyanarayana Rao Bahadur and others .. *Respondents* (*Defendants*).

Water-course—Duty of neighbouring estate owners not to prevent flowing of water as per mamool—Damage whether necessary to be proved for injunction. Zamindar of Bethavole *v.* Satyanarayana Rao Bahadur.

There were two neighbouring proprietors in relation to a natural water-course which was flowing between their two estates which formed before partition among the plaintiff and defendants one estate. By the partition deed the water-course was to be kept joint and none of them should cause obstruction to supply channels flowing as per mamool till that date from one part to another. The question of controversy was whether the plaintiff was entitled to put up a bund and could restrain defendants from interfering with plaintiff's raising of bund.

Held, that from the evidence in the case since the putting up a bund was an infraction of the right of the defendants, the defendants had every right to have it removed without showing any damage.

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1. (1885) I.L.R. 8 Mad. 381.

* Appeal No. 21 of 1936. 16th November, 1939.

Zamindar of Bethavole *v.* Satyanarayana Rao Bahadur.

Bickett v. *Morris*, 1 Scotch Appeals 47 and *Kanakayya* v. *Narasimhulu*, (1895) I.L.R. 19 Mad. 38, followed.

Appeal against the decree of the Court of the Subordinate Judge of Bezwada dated 11th April, 1935 and passed in O. S. No. 81 of 1929.

Ch. Raghava Rao, M. S. Ramachandra Rao and *D. R. Krishna Rao* for Appellant.

B. Sitarama Rao and *P. Sivaramakrishnayya* for Respondents.

The judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.—The facts necessary for the disposal of this appeal lie in a narrow compass. The question in dispute is between two neighbouring proprietors in relation to a natural water-course known as Durgadevi Cheruvu which flows between the two estates of North Vinagadapa and the South Vinagadapa. The plaintiff is the owner of the estate of South Vinagadapa, and defendants 1 and 2 are the owners of North Vinagadapa. Both these estates formed part of one estate which belonged to two brothers who partitioned it in 1844 by a deed of partition dated 29th August, 1844 (Ex. N). Under the said partition it was stipulated that the mountains, water-courses and certain other properties should be kept joint and none of them should cause obstruction to the supply channels and water channels flowing as per mamool till that date to the tanks from one part of the estate to another.

The Durgadevi vagu rises in a forest in the North-east of both the estates and flows in a westerly direction and empties itself into the Durgadevi tank within the limits of Vinagadapa South. It is the case of the plaintiff that no portion of the Durgadevi vagu flows through the estate of North Vinagadapa. But it is the case of the defendants that a portion of the vagu flows through a *donka* which is common to both parties and that the said *donka* forms part of the boundary of both the estates. That the *donka* belongs in common to the proprietors of both the estates cannot be disputed. This was not controverted by the plaintiff or his witnesses. The first issue was raised on the basis of the joint ownership of the *donka.* It is also the defendants' case that the course of the vagu is in the form of a big curve marked as B, C, A, in the plan Ex. C when it traverses the *donka* and not in a straight course. It is the case of the plaintiff that the course of the

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vagu has always been straight falling within the limits of the plaintiff's estate and that no portion of it goes through the common *donka*. The necessity for the action has according to the plaintiff been occasioned by the demolition of a bund marked A, B in Ex. C which is at the southern extremity of the *donka* by the defendants in July, 1929, after it was repaired by the plaintiff. The plaintiff alleges that in 1925, there was a cyclone which caused an erosion in the Durgadevi vagu and diverted the water in a circular course in the vagu preventing the water reaching the Durgadevi tank and a bund was built in order to prevent such a diversion and the said bund existed from 1925 to July, 1929, when the defendants demolished it. Certain criminal proceedings were started in consequence and the parties were ultimately referred to a regular suit. The defendants denied that there was any such bund erected in 1925 and alleged that the bund was newly erected in 1929 because the defendants constructed a channel called the Gopavaram vagu to lead water from Gopavaram tank which is in the extreme east of their estate to the Durgadevi vagu to increase the water-supply of Durgadevi tank, that by reason of the bund having been erected water which was naturally flowing from the *donka* into the tank known as Rallacheruvu was interfered with and they suffered damages thereby.

The main question in controversy between the parties is whether Durgadevi vagu was flowing in a straight course or in a bent course through the common *donka*. The suit is in substance for a declaration that the plaintiff is entitled to put up a bund to the Durgadevi vagu at the portion marked A B, and for an injunction restraining the defendants from interfering with the plaintiff when he raises any such bund or when repairs are effected for the same. In fact all the issues relate solely to this question. A larger question as to the water of Durgadevi vagu flowing into the Rallacheruvu vagu was also raised in the pleadings. But no issues were framed in regard to that matter though some evidence was let in on this question also. The main question for decision is only as to the right of the plaintiff to put up a bund in the Durgadevi vagu as alleged by him. This is again dependent upon the question whether the vagu runs in a straight course or in a bent course. The plaintiff can only succeed if it runs only in straight course. If the finding is that it goes in a bent course the plaintiff's suit fails. The

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learned Subordinate Judge has found that the Durgadevi vagu was flowing in a bent course and not in a straight course at the disputed locality and that the vagu does not lie exclusively in the estate of the plaintiff. It is this finding which Mr. Raghava Rao attacks on behalf of the plaintiff. The evidence relating thereto has been elaborately discussed by the learned Subordinate Judge and in view of the fact that we are agreeing with his conclusion we think it unnecessary to deal with the evidence at length. We propose to refer only to a few salient features which render the plaintiff's case improbable.

[Their Lordships after discussing the evidence proceeded thus:]

The question is whether the plaintiff is entitled to erect a bund. The *donka* being common property, its bed belongs to both the plaintiff and defendants 1 and 2. Mr. Sitarama Rao has contended that it is not open to the plaintiff to put up the bund and interfere with the enjoyment of the common property and that defendants 1 and 2 have a right to prevent the putting up of the bund even though they are not able to show any damage or the likelihood of any damage. It seems to us that this contention is well-founded. In *Bickett* v. *Morris*[1], Lord Westbury enunciated the principles at page 62 thus:

"It is wise, therefore, to lay down the general rule, that, even though immediate damage cannot be described, even though the actual loss cannot be predicted, yet, if an obstruction be made to the current of the stream, that obstruction is one which constitutes an injury which the Courts will take notice of, as an encroachment which adjacent proprietors have a right to have removed. In this sense, the maxim has been applied by the law of Scotland that where you have an interest in preserving a certain state of things in common with others, and one of the persons who have that interest in common with you desires to alter it, you have a right to preserve the state of things unimpaired and unprejudiced in which you have that existing interest."

Applying this principle it was held in *Kanakayya* v. *Narasimhulu*[2], that one of the two tenants in common of a party wall could not raise the party wall with a view to building a superstructure on his own tenement without the consent of the other tenant though he might suffer no inconvenience therefrom. The principle laid down in *Bickett* v. *Morris*[1], has been approved by their Lordships of the Judicial Committee in

1. 1 Scotch Appeals 47.

2. (1895) I.L.R. 19 Mad. 38.

Maung Bya v. *Maung Kyi Nyo*[1], (*Vide* the observations of Lord Atkinson at pages 500 and 501). Therefore the putting up of the bund A B in this case is an infraction of the right of the defendants and the defendants have every right to have it removed without showing any damage. But in this case it is admitted by the plaintiff's witnesses themselves as already stated that the bund would prevent any water from overflowing the vagu and reaching the Rallacheruvu. The defendants have this right even under Ex. N which clearly provides that no obstruction should be caused to the water flowing as per mamool in the channels from one estate to another.

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But there remains another question which was raised by Mr. Raghava Rao. He has asked for an injunction restraining the defendants from interfering with the Durgadevi vagu. The defendants asserted a right to take water from the vagu through certain passages which according to Mr. Raghava Rao were newly dug after the institution of the suit as will appear from the several applications made by his client in the lower Court for the appointment of a Commissioner to inspect the locality and prepare a plan of the existing topographical features. Unfortunately, an issue was not raised relating thereto but there is no doubt, that the question whether any water would overflow from the Durgadevi vagu in its natural condition having regard to the situation of the vagu and the defendants' lands did arise and the evidence establishes that during the time of high flood or when water reaches a certain height in Durgadevi vagu it would overflow into Rallacheruvu vagu. In fact in the written statement the claim that was put forward by the defendants was that the water of the vagu has been flowing uninterruptedly into the Rallacheruvu vagu from time immemorial and the plaintiff had no legal right to impede the usual flow of the vagu. All that the defendants can claim in this case is that the plaintiff should not do anything which would prevent the overflow of the water in its natural state from the Durgadevi vagu into a Rallacheruvu vagu either during high floods or when the water reaches a particular level which would cause an overflow of the water. Once the water falls on the defendants' land, the defendants can take such steps as they may to conserve it. If the defendants have got any other right, it is open to them to take such appropriate proceedings as they may be

1. (1925) I.L.R. 3 Rang. 494: 49 M.L.J. 282: L.R. 52 I.A. 385 (P.C.).

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advised to have it declared and safeguarded and it cannot be gone into in this suit.

In the result the appeal fails and is dismissed with costs.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Pandita Viswanadha Yegneswara Sastri .. *Appellant** (*Plaintiff*)

v.

The Secretary of State for India in Council represented by the Collector, East Godavari, Cocanada .. *Respondent* (*Defendant*).

Yegneswara Sastri v Secretary of State for India in Council.

Madras Revenue Recovery Act (II of 1864), S. 58—Dispute as to area of land and assessment—Civil Court if can consider the question.

Where revenue authorities wrongly estimated the assessment and objection was raised that the area of the land had been wrongly estimated and the revenue authorities therefore arrived at a wrong figure in regard to the assessment,

Held, even if S. 58 of the Revenue Recovery Act does not operate as a bar to the granting of a declaration as to the area it will be clearly improper for a Civil Court to exercise its discretion and give a declaration which will have the effect of circumventing the provisions of S. 58 of the Revenue Recovery Act.

Second appeal against the decree of the Court of the Subordinate Judge of Cocanada in A. S. No. 216 of 1935, preferred against the decree of the Court of the District Munsif of Cocanada in O S. No. 71 of 1932.

D. Narasaraju and *P. S. Sarma* for Appellant.

The Government Pleader (*B. Sitarama Rao*) for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff's contention seems to be that the area of his land has been wrongly estimated by the Revenue authorities and that they therefore arrived at a wrong figure in regard to the assessment due by him. The trial Court dismissed his suit on the ground that a Civil Court was prohibited by S. 58 of the Revenue Recovery Act from considering the question raised by the plaintiff and that decision was upheld in appeal.

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*S. A. No. 1052 of 1936. 1st December, 1939.

Yegneswara Sastri v. Secretary of State for India in Council.

There is no doubt in my mind that the lower Courts were right. In disputing the area of his land the plaintiff is disputing the amount of the assessment; for the assessment is calculated on the basis of the areas of wet and dry lands. It is realised by the learned advocate for the appellant that to some extent S. 58 acts as a bar; but the plaintiff is now willing to forego his claim to a refund of what he alleges to be an excess assessment and is prepared to confine his appeal to his right to a declaration that the area of his land is 25·35 acres and not 27·91 acres as shown in his patta. S. 58 does not merely prohibit the passing of a decree with regard to assessment; but also prohibits a Civil Court from taking into consideration or deciding any question as to the amount of assessment fixed. In considering whether the area is 25·35 acres or 27·91 acres, the Court is necessarily deciding a question with regard to the amount of assessment. After all, what the plaintiff is interested in is not so much the area of the lands shown in his patta as the amount of assessment that he has been called upon to pay.

Even if S. 58 does not operate as a bar to the granting of a declaration as to the area, it will be clearly improper for a Civil Court to exercise its discretion and give a declaration which will have the effect of circumventing the provisions of S. 58 of the Revenue Recovery Act.

The learned advocate for the appellant has quoted several authorities which he considers to be helpful; but I will only refer to the two upon which he lays most stress. The first is *Madathapu Ramayya* v. *Secretary of State for India in Council*[1], which was a case in which the Revenue authorities taxed a man for encroachment of his pial on a public road. It was there held that the Government had no right to assess such encroachment and that a Civil Court was entitled to say so. The remark in the judgment of Bashyam Aiyangar, J., is relied upon:

"Civil Courts have jurisdiction to decide whether or not the land or person is at all under liability to be assessed for land revenue."

That is true; if in the present case the wrong area were due to the fact that the Government had insisted on including some item of land in his patta which was not his at all, then the plaintiff would no doubt have some cause of action in a Civil Court. *Secretary of State for India in Council* v. *V. K.*

1. (1903) 14 M.L.J. 37: I.L.R. 27 Mad. 386 (F.B.).

Yegneswara Sastri v. Secretary of State for India in Council.

*Ramanujachariar*1 is a decision of Devadoss and Jackson, JJ., which has been overruled by their Lordships of the Privy Council and is not therefore of much value as an authority. In so far as that judgment referred to the effect of S. 58 of the Revenue Recovery Act, their Lordships of the Privy Council said that they expressed no opinion. Devadoss, J., said on that point:

"Such assessment being illegal and *ultra vires*, the plaintiff is not debarred from bringing this suit by the provisions of S. 58 of the Revenue Recovery Act."

If the revenue authorities had acted *ultra vires*, by assessing some property on which they had no right to levy assessment—such as was found to be the case in *Madathapu Ramayya* v. *Secretary of State for India in Council*[2]—then no doubt a Civil Court can say so.

The appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Federal Court of India.]

PRESENT:—VISCOUNT MAUGHAM, LORD PORTER AND SIR GEORGE RANKIN.

P.C.

Hori Ram Singh v. King-Emperor.

Hori Ram Singh .. *Appellant**

v.

The King-Emperor .. *Respondent.*

Procedure—Federal Court of India—Appeals to Privy Council—Only admissible in substantial cases.

Appeals from the Federal Court of India to the Privy Council should be admitted only in cases of real substance. Appeal held inadmissible on the ground that it arose only out of the construction of a very exceptional section of the Government of India Act, 1935, the question raising a technical point and one which would have no application in the future.

Petition for special leave to appeal from a judgment† and order of the Federal Court of India dated 12th April, 1939, partly reversing and partly affirming a judgment and order of the High Court at Lahore, dated 20th October, 1938.

The facts are found in the report of the Federal Court judgment in (1939) 2 M.L.J. (Supp.) 23.

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1. (1924) 47 M.L.J. 780: I.L.R. 48 Mad. 282.
2. (1903) 14 M.L.J. 37: I.L.R. 27 Mad. 386 (F.B.).

*18th January, 1940.

† (1939) 2 M.L.J. (Supp.) 23.

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The Federal Court having refused the petitioner leave to appeal against that order to His Majesty in Council, he applied to the Board for special leave to appeal.

Robert Gibson, *K. C.* and *C. J. Colombos* for Petitioner.

G. D. Roberts, *K. C.* and *W. Wallach* for the Crown were not called upon to argue.

18th January, 1940. Their Lordships' judgment was delivered by

Viscount Maugham.

VISCOUNT MAUGHAM.—Their Lordships do not require to hear Counsel for the Crown.

This is an application for special leave to appeal *in forma pauperis* from a judgment of the Federal Court of India, and it has the distinction of being the first application for such leave from that Court.

The question which arises is as to the true construction of S. 270, sub-S. 1, of the Government of India Act, 1935. It is in these terms: "No proceedings, civil or criminal, shall be instituted against any person in respect of any act done or purporting to be done in execution of his duty as a servant of the Crown in India or Burma before the relevant date", which is the 1st April, 1937, "except with the consent", putting it shortly as applying to this particular case, "of the Governor" of the Province in which the petitioner was employed. It is perfectly clear, therefore, that this section is in the nature of an exceptional section which is intended to afford some measure of protection to certain public servants in relation to acts done or purported to be done in execution of their duty, being acts done before the date in question.

Their Lordships ought not to forget the fact that the matter has been before the Federal Court and that an appeal from the Federal Court should not lightly be admitted by this Board, and should only be admitted if it arises in a really substantial case.

In this case it does not seem to their Lordships that the matter is anything but one concerned with the construction of a very exceptional section which will have no application in the future, and it is a technical point. They have had the view of the Federal Court with regard to it and, having regard to all the circumstances of the case and bearing in mind the ingenious argument which has been presented to them, they do not think that this is a case in which their Lordships should advise His

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Majesty to grant leave to appeal. In those circumstances, the application for leave must be dismissed. The Council Office fees will be remitted as it is a petition *in forma pauperis*, but otherwise there will be no order as to costs.

Solicitors for Appellant: *Hy. S. L. Polak & Co.*

Solicitors for Respondent: *The Solicitor, India Office.*

R. C. C. *Petition dismissed.*

K. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Angora Satyanarayanamurthy .. *Appellant* (1st Defendant)*

v.

Angora Venkamma and another .. *Respondents (Plaintiffs 1 and 2).*

Satyanarayanamurthy v. Venkamma.

Madras Hereditary Village Offices Act (III of 1895), S. 21—Scope.

Appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in A. S. No. 18 of 1935 preferred against the decree of the Court of the District Munsif of Ramachandrapuram in O. S. No. 156 of 1933.

Plaintiffs sued to divide the suit lands (Village Service Inam lands) in which both the first plaintiff and first defendant had joint rights. The Revenue Courts had already declared the rights of the parties and had given symbolical possession of half share to the first plaintiff. It was contended that the case dealt with the emoluments of a carpenter's service Inam and Civil Court had no jurisdiction on account of Ss. 13 and 21 of the Madras Hereditary Village Officers Act.

M. S. Ramachandra Rao for Appellant.

Challa Rama Rao for Respondents.

The Court delivered the following

JUDGMENT.—The appellant's claim that the suit was barred by S. 21 of Madras Act III of 1895 cannot be allowed. This is not a suit for recovery of the emoluments of a Village Office (S. 13 of the Act) but a suit for partition of the inam land between two persons whose right to the inam in equal shares has already been established.

This appeal is dismissed with costs.

Leave refused.

K. S. *Appeal dismissed.*

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* S. A. No. 1212 of 1936. 1st February, 1940.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE HORWILL.

The Hindu Religious Endowments Board, Madras .. *Appellant** (*7th Defendant*)

v.

Namburu Krishnamacharyulu and others .. *Respondents* (*Plaintiff and Defendants 2 to 6*).

H. R. E. Board Madras *v.* Namburu Krishnamacharyulu.

Hindu Religious Endowments Board—Scheme for management of temple —Power of supervision of the Board in respect of appointment of staff, etc., made subject to final control of District Judge for the time being—If conflicts with unrestricted power conferred on the Board by the statute—Effect.

In a scheme for management of a temple it was provided that the general power of supervision exercised by the Hindu Religious Endowments Board over the work of the trustees and in respect of the appointment of the staff should be subject to the final control of the District Judge for the time being.

Held, this restriction is in conflict with the statute which gives absolutely unrestricted power of supervision of the Board in those matters and such restriction should be removed.

Appeal against the decree of the District Court of Guntur dated 15th December, 1936 and passed in O. S. No. 3 of 1934.

P. V. Rajamannar and *K. Subba Rao* for Appellant.

V. Subramanyam for Respondents.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—In this appeal which is preferred by the Hindu Religious Endowments Board, Madras, through its President the only point pressed is that certain modifications in the scheme sanctioned by the District Judge of Guntur should be made. The scheme was one for the management of the well-known temple of Sri Lakshmi Narasimhaswami at Mangalagiri in the Guntur District. This scheme has been in operation from 1917 onwards (*vide* Ex. A the Rajinama scheme). The present suit was instituted by a worshipper with the sanction of the Board for the removal of the existing trustees, for the appointment of proper trustees and for a modification of the scheme. The District Judge held that there was no necessity to remove any of the trustees or to consider any of the prayers in the plaint except the prayer for a modification of the scheme and directed certain modifications. It would appear that though the Board put its views before the Court in its written statement, nevertheless when the case came

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* Appeal No. 141 of 1937. 14th February, 1940.

H. R. E. Board, Madras v. Namburu Krishnamacharyulu. — Pandrang Row, J.

up for hearing the Board was not represented by any one and the modifications made by the learned Judge in the Court below were made without the advantage of the Board's suggestions in the matter.

The objection taken now in appeal relates to two different matters. One is to the addition of certain words in paras. 18 and 19 to the original scheme and the other to the provision regarding the appointment of trustees contained in cl. (3) of the decree. Paras. 18 and 19 provide that the general power of supervision exercised by the Hindu Religious Endowments Board over the work of the trustees and in respect of the appointment of the staff should be subject to the final control of the District Judge for the time being. This restriction appears to be in conflict with the statute which gives absolutely unrestricted power of supervision to the Board in these matters and we therefore accept the appeal so far as this point is concerned and direct that the words "subject to final orders of the District Judge for the time being" and "subject to the final control of the District Judge for the time being" found in paras. 18 and 19 be deleted.

The other objection is to the provision contained in cl. 3 of the decree providing that the place of the retiring trustee should be filled by the District Judge after calling for applications and after considering the views of the Hindu Religious Endowments Board and the remaining trustees. We do not think that there is anything really objectionable in this provision and we see no reason to interfere with this provision in the decree.

The parties will bear their own costs, and they will be at liberty to take their costs out of the endowment.

K.S. —— *Appeal accepted in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE LAKSHMANA RAO.

Narayanan Chettiar .. *Appellant* (Petitioner-2nd Defendant)*

v.

Chidambaram Chettiar .. *Respondent (Respondent-Plaintiff).*

Narayanan Chettiar v. Chidambaram Chettiar.

Civil Procedure Code (V of 1908), O. 9, r. 13—Application under pending trial—Interim order on applicant to deposit costs of suit or furnish security

*A.A.O. No. 460 of 1938. 6th February, 1940.

Narayanan Chettiar *v.* Chidambaram Chettiar.

for decree amount—Power to make—Dismissal of application for failure to furnish security—Propriety.

Pending trial of an application under O. 9, r. 13 of the Civil Procedure Code, the Subordinate Judge had no power to order that the applicant should deposit the costs of the suit or furnish security for the decree amount. If he had dealt with the application on its merits and had decided to grant it merely prescribing conditions under O. 9, r. 13 no appeal would have been entertained. The Judge could not dismiss the application for not furnishing security.

Appeal against the order of the Court of the Subordinate Judge of Devakottai dated 7th September, 1938 and made in I.A. No. 218 of 1938 in O. S. No. 187 of 1937.

T. L. Venkatarama Aiyar for Appellant.

G. N. Chari for Respondent.

The Court delivered the following

JUDGMENT.—The order of the lower Court cannot be upheld. The learned Subordinate Judge had no power to order, pending trial of an application under O. 9, r. 13 of the Code of Civil Procedure that the applicant should deposit the costs of the suit or furnish security for the decree amount. If he had dealt with the application on its merits and had decided to grant it merely prescribing conditions under O. 9, r. 13, no appeal would have been entertained. No such order was passed and the learned Subordinate Judge has dismissed the application merely because the security was not furnished. That he could not do. The order dismissing the application is accordingly set aside. The application must be restored to file and disposed of according to law. Costs to abide and follow the result.

K. S. —— *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE HORWILL.

Manthiri Goundan .. *Appellant* (Petitioner)*

v.

Arunachalam Goundan and another .. *Respondents (Respondents).*

Manthiri Goundan *v.* Arunachalam Goundan.

Civil Procedure Code (V of 1908), O. 21, r. 90—'Sale of property of person since adjudged insolvent—Insolvent if person affected by sale.

* A. A. O. Nos. 303 and 304 of 1938. 4th January, 1940.

Manthiri Goundan v. Arunachalam Goundan.

The words "whose interests are affected by the sale" must be construed in their ordinary sense and it is too much to say that merely because a person is adjudicated insolvent his interests are not adversely affected by the sale of property that belonged to him before adjudication.

Case-law reviewed.

Subbaraya Goundan v. Virappa Chettiar Bank, (1933) 65 M. L. J. 719 (F.B.), followed.

Appeals against the orders of the Court of the Subordinate Judge of Coimbatore dated 9th December, 1937 and 2nd March, 1938 and made in E. A. Nos. 651 and 1863 of 1937 in E. P. R. No. 509 of 1935 in O. S. No. 18 of 1934.

S. Thyagaraja Aiyar for Appellant.

V. C. Viraraghavachari for Respondents.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—These appeals are connected. One is from an order dismissing the application of the appellant to restore to file the petition to set aside a sale presented by him which had been dismissed for default; and the other is an appeal from the order dismissing the petition to set aside the sale. The appellant who was the first defendant in O. S. No. 18 of 1934 had been adjudicated an insolvent and the application was made by him to set aside the sale on various grounds. That application was dismissed for default on the 9th December, 1937. An application to restore the petition to file was made on the next day and that also was dismissed. As a result we have two appeals from the two orders which were passed against the appellant. So far as the application made on the 10th December, 1937, to restore the petition to file is concerned it is not seriously argued that such a petition was competent. The learned Subordinate Judge relied on the Full Bench decision in *Arunachalam* v. *Veerappa Chettiar*[1] and his finding to the effect that the petition to restore the application to set aside the sale is not maintainable is obviously right. It follows from this that C. M. A. No. 304 of 1938 has no substance and must be dismissed. It is accordingly dismissed with costs.

The other appeal which is from the order dismissing the application to set aside the sale is pressed mainly on the ground that the finding of the Court below that such an application made by the appellant is not competent because he had been adjudicated as an insolvent is wrong, and further on the ground

1. (1931) 61 M.L.J. 348: A.I.R. 1931 Mad. 656 (F.B.).

Manthiri Goundan v. Arunachalam Goundan.

Pandrang Row, J.

that on the merits it had been held that the appellant was really disabled by illness from attending Court when his application came on for hearing and therefore the application for adjournment that was made to the Court below on this ground of illness ought to have been allowed instead of being rejected. The first point, namely, the appellant's right to apply to have the sale set aside is governed by the provisions of O. 21, r. 90 of the Civil Procedure Code under which the application was made. That rule provides that any person whose interests are affected by the sale may apply to set aside the sale. The question therefore for decision is whether the appellant is not a person whose interests are affected by the sale of the properties in question. Those properties were undoubtedly his properties which had been mortgaged and which had been sold in execution of the mortgage decree. His adjudication as an insolvent and the vesting of these properties and all his other properties in the Official Receiver no doubt deprived him of all interest in the property *in praesenti*. But does this mean that he ceased to be a person whose interests are affected by the sale of the properties? The point is really concluded in our opinion by the Full Bench decision in *Subbaraya Goundan* v. *Veerappa Chettiar Bank*[1]. That was also a case of an insolvent and it was held that the insolvency of the judgment-debtor did not *per se* render it incompetent for him to continue proceedings initiated by him under O. 21, r. 90 and that he had also a right to prefer an appeal from an order dismissing such an application. There is an earlier case reported at page 359 of the same volume of the Madras Law Journal decided by a single Judge, namely, *Swaminatha Odayar* v. *Kalyanarama Aiyangar*[2]. We have also been referred to the latest Full Bench decision in *Ayyappa* v. *Kasi Perumal*[3], in which it is pointed out by the learned Chief Justice that the narrower meaning given to the phrase "whose interests are affected by the sale" in certain decisions is not the correct meaning to be given to those words but that the words should be taken to mean any person whose pecuniary interests are immediately and directly affected and that the decision in *Kathiresan Chettiar* v. *Ramasami Chettiar*[4], which interpreted the words to mean having an interest in the property sold was wrong, and that decision was overruled expressly by the Full Bench.

1. (1933) 65 M.L.J. 719 (F.B.).
2. (1933) 65 M L.J. 359.
3. (1939) 1 M.L.J. 163: I.L.R. (1939) Mad. 374 (F.B.).
4. (1914) 27 M.L.J. 302.

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In these circumstances it is obvious that the learned Subordinate Judge was not right in coming to the contrary conclusion relying on the cases reported in *Hari Rao* v. *Official Assignee, Madras*[1] and *Venkataramanayya* v. *Bangarayya*[2], which were not concerned with the words with which we are now concerned, namely, the words found in O. 21, r. 90, but with the word "aggrieved" found in the Insolvency Acts. It seems to us that the words "whose interests are affected by the sale" must be construed in their ordinary sense, and it is too much to say that merely because a person is adjudicated insolvent his interests are not adversely affected by the sale of property that belonged to him before adjudication. For instance, if the insolvent's property is really worth a lakh of rupees and is sold fraudulently for Rs. 10,000 his interests are clearly affected by such a sale. There is no reason why these words should be interpreted in a narrow sense; on the other hand, as observed already, the point is concluded by authority which is binding on us and we would follow it even if it was not so binding because we take the same view. We find therefore that the lower Court's finding on the right of the appellant to present the application to set aside the sale is wrong and that he is entitled to present the application and to ask the Court to adjudicate upon it.

The only other question that remains is whether the petitioner had a reasonable opportunity of being heard when his application came on for hearing. This would turn on the question of the propriety of the order of the Court below refusing to grant an adjournment which was applied for on the 9th December, 1937. It is not now seriously disputed that the appellant was really too ill to be present in Court on that day as he had undergone an operation for fistula. There is the evidence of the doctor who attended on him and there is really no room for doubt on the point; and it may therefore be taken as established that the appellant was really disabled by his illness from being present in Court when his application to set aside the sale came on for hearing. In these circumstances the Court below ought to have granted the adjournment that was applied for because the appellant was entitled to have a reasonable opportunity of being present in

1. (1926) 50 M.L.J. 358 : I.L.R. 49 Mad. 461 (F.B.).
2. (1934) 67 M.L.J. 942.

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Court when his application was being heard on its merits. It is said that what the appellant wanted was merely to have his evidence taken on commission and this he could have done in spite of his illness which did not prevent his giving evidence in his own house. This loses sight of the fact that the appellant was not entitled as a matter of course to have a commission taken out because the provisions relating to the issue of a commission do not apply to execution proceedings. Even otherwise, though there is this reference to examination of the appellant on commission for the purpose of obtaining his evidence, it does not mean that the appellant was not also anxious to exercise his right and privilege of being present himself in Court when his case was being taken up. Ordinarily a party is entitled to be given a reasonable opportunity for being physically present himself when his case is being heard, and if his physical presence is made impossible by reason of illness, justice requires that he should be given an adjournment for the purpose of enabling him to be present. In the present case the Court below was made aware of the illness which prevented the appellant from being present in Court and an application for adjournment had been made on this ground. In the circumstances we are of opinion that the lower Court erred in refusing to grant an adjournment and it follows that the appellant should be given a fresh opportunity of establishing his case. This appeal is therefore allowed and the order of the Court below dismissing the application to set aside the sale is set aside and the application is remanded to the Court below for fresh disposal on the merits according to law. The costs of this appeal will abide the event and should be provided for in the revised order to be passed by the Court below.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE LAKSHMANA RAO.

Subhadrammal .. *Appellant* (Plaintiff)*

v.

Kannammal .. *Respondent (1st Defendant).*

Subhadrammal v. Kannammal.

Hindu Law—Husband and wife—Receipt of separate maintenance by wife—If 'judicial separation' from husband—Effect on right to deceased husband's Government Provident Fund—Succession certificate if essential.

*C.C.C.A. No. 28 of 1939. 21st February, 1940.

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A Government servant in respect of his Provident Fund amount had, under the Provident Fund Rules, nominated his concubine excluding his wife on the ground that she was judicially separated from him as she was in receipt of separate maintenance. On his death the widow filed a suit for a declaration that the nomination of the concubine was invalid and that she alone was entitled to the amount.

Held, "judicial separation" must be given its technical meaning. It is impossible in technical language to speak of a Hindu wife or husband as being "judicially separated" from one another. The Provident Fund Rules, r. 17, note (1) cannot be taken to exclude a Hindu wife who had obtained a decree for separate maintenance. The widow is entitled to the amount and she is under no liability to obtain a succession certificate.

Appeal against the decree of the Additional Judge, City Civil Court, Madras, dated 7th March, 1939 and passed in O.S. No. 919 of 1937.

S. Amudachari for Appellant.

A. Subramanyam and *C. Vedagirirama Sastri* for Respondent.

The judgment of the Court was delivered by

King, J.

King, J.—The subject-matter of this appeal is the sum standing to the credit of one D. G. Chetty in Provident Fund. D. G. Chetty was a Government servant who died in the year 1937. In 1928, the present plaintiff, who is D. G. Chetty's widow, filed a suit against him for separate maintenance and in May, 1929, was given a decree. In August 1929, D. G. Chetty made a fresh nomination under the rules of the Provident Fund by which he appointed the first defendant, his mistress, as the person entitled to receive the amount of the fund in case of his death.

The question before us is whether the plaintiff or the first defendant is entitled to this money, or to put it in other words, whether the nomination made by the subscriber in August, 1929, is a valid nomination under the rules or not. The learned Additional City Civil Judge has held that the nomination is valid and comes within the scope of Note 1 to r. 17. R. 17 deals with the disposition of a provident fund upon the death of a subscriber before retirement and mentions the various contingencies which will arise. Under Note 1, it says that:

> "A husband may make a written application for the exclusion of his wife from participation under cl. (*b*), if she has been judicially separated from him . . . . ."

The question before us can therefore once again be stated in this way: "Is a Hindu wife who has obtained a decree for

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separate maintenance judicially separated from her husband?" If she is judicially separated from him, it is conceded that the nomination in this case is within the powers of the depositor under the rule. If she has not been, the effect of the Provident Fund Rules is to vest the whole of this fund in the plaintiff. The learned Additional City Civil Judge holds that the words "judicially separated" in this note must be given an extended meaning. In para. 32 in setting out the argument of the learned Advocate for the first defendant, he says that "judicially separated" has to be interpreted as "meaning and including the judicial recognition or adjudication of the right of a person to live separately from her spouse."

The learned City Civil Judge then goes on to point out various analogies between the position of a Hindu wife who has obtained a decree for separate maintenance and a Christian wife who has obtained a decree for judicial separation in the technical sense. We are emphatically of opinion that in arriving at the meaning of the words "judicially separated" we must take their technical meaning rather than a more popular and extended meaning unless there are very good reasons shown to the contrary from an analysis of the Provident Fund Rules themselves. The expression "judicial separation" and its cognate form "judicially separated" are not expressions to be found in ordinary language. They are expressions of the law with a distinct and exact technical meaning. It is impossible in technical language to speak of a Hindu wife or husband as being judicially separated from one another. No doubt, if the words were construed apart from their legal context, it might be possible to say that when a judge holds that a wife was justified in living apart from her husband, she has been separated from her husband by judicial action. But, as we say, there must be cogent reasons to compel us to adopt any such extended meaning for these words. When we examine the Provident Fund Rules as a whole, we are led to the irresistible conclusion that their main purpose is to preserve the rights of the family of the subscriber to receive his Provident Fund in the event of his untimely death. The word 'family' is defined in the rules and of course includes the depositor's wife. We think that there must be some strong reasons why a person who is still a member of the depositor's family should be excluded from the benefit of these rules. According to the interpretation which the learned Advocate for the respondent would have us

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adopt, the plaintiff, although she has herself suffered ill-treatment from her husband, has to be excluded from the benefit of these rules. We can see no reason why if the general purpose of the Provident Fund Rules is to ensure that a depositor's Fund shall go in the absence of other members of his 'family' to his wife, the fact that a wife has been driven by her husband's conduct to live apart from him and to sue for the maintenance to which she is entitled as a wife, should prevent her from receiving the amount of his Provident Fund after his death. The provisions of the law with regard to judicial separation are contained in Ss. 22 to 25 of the Divorce Act (IV of 1869). According to S. 22, a decree for judicial separation is to replace a decree which had theretofore been in force for a divorce *a mensâ et toro*. According to S. 24:

"In every case of a judicial separation under this Act, the wife shall, from the date of the sentence, and whilst the separation continues, be considered as unmarried with respect to property of every description which she may acquire, or which may come to or devolve upon her."

According to S. 25:

"In every case of a judicial separation under this Act, the wife shall whilst so separated, be considered as an unmarried woman for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any contract, act or costs entered into or done, omitted or incurred by her during the separation."

Under S. 23, a decree for judicial separation may be granted on the application of either the husband or the wife. As already mentioned, the learned City Civil Judge has drawn several analogies between the position of a Hindu wife who obtains a decree for separate maintenance and a Christian wife who obtains a decree for judicial separation under the Divorce Act. But this analysis of the sections of the Divorce Act shows that judicial separation is a separation far wider than the relationship existing between a Hindu husband and wife in the situation of the depositor and the plaintiff in this case. We think that the first note to r. 17 of the Rules was inserted not in order to give the depositor wider latitude in the disposition of his own property, but in order to exclude for the purposes of the Rules a wife who has been in the strict sense of that term 'judicially separated' because such a wife, although not completely divorced from him and therefore not completely excluded from his family, is yet, partly excluded from his family, to the considerable extent shown by the various sections to which we have referred. A Christian wife judicially separated from her husband is therefore

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very near in status to a stranger, and we think the intention of the framers of the rules of the Provident Fund must have been to allow the depositor to ignore her as if she had been completely divorced from him. When we look at the rules from this point of view, that their main purpose is to preserve for the members of the depositor's family the right to receive his Provident Fund, we can see no reason to think that the framers of the Rules would have intended to exclude a Hindu wife who had obtained a decree for separate maintenance. The status of such a Hindu wife is not, in any real sense, equivalent to the status of a wife judicially separated under the Divorce Act, and we can see no reason why a Hindu wife who has been placed in the unfortunate position of having to sue for separate maintenance owing to her husband's conduct should for any purpose be considered as outside the list of those who are entitled to benefit under the Rules.

We accordingly are of opinion that the decision of the learned Additional City Civil Judge is wrong, and that this appeal must be allowed and that the plaintiff's suit with respect to the Provident Fund must be decreed with costs throughout.

The learned Additional City Civil Judge has appended a note to para. 43 of his judgment to say that:

"the decree in this suit shall not be treated as exonerating either the plaintiff or the first defendant or the second defendant from obtaining the necessary certificate under the Indian Succession Act or the Administrator-General's Act."

It was, in our opinion, quite unnecessary for this note to have been added to the judgment. The parties to a proceeding of this kind are under no liability to obtain any Succession Certificate; the amount vests in them upon the death of the depositor.

K.S. —— *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KING AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

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Kumaravel Nadar v. Shanmuga Nadar.

E. P. Kumaravel Nadar .. *Petitioner** (*Petitioner*)

v.

T. P. Shanmuga Nadar and others .. *Respondents* (*Respondents*).

Code of Criminal Procedure (V of 1898), Ss. 195 and 476—Criminal Rules of Practice, r. 37—Validity of rule—Complaint in respect of offence alleged

* S. R. Nos. 32601, 32137 and 28253 of 1939. 4th March, 1940.

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to have been committed in relation to a proceeding in Court—Revisional jurisdiction of High Court—Whether civil or criminal.

In respect of complaints as to offences alleged to have been committed in relation to proceedings in Court,

Held, a Civil Court does not cease to be a Civil Court when it is considering an application made to it under S. 476, Criminal Procedure Code, and if for the purpose of that application it remains a Civil Court it must be governed by the provisions of the Code of Civil Procedure.

An application for revision arising out of proceedings in a civil suit must be dealt with as a Civil Revision Petition and a similar application arising out of criminal proceedings as a Criminal Revision Petition.

Case-law discussed.

King-Emperor v. *Karri Venkanna Patrudu*, (1916) 31 M.L.J. 440 (F.B.), followed.

In re *D. S. Raju Gupta*, (1939) 1 M.L.J. 480: I.L.R. (1939) Mad. 439, overruled.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of the District Court of Tinnevelly dated 30th August, 1939 and made in C. M. A. No. 6 of 1939 preferred against the order of the Court of the Subordinate Judge of Tinnevelly dated 1st December, 1938 and made in O. P. No. 19 of 1939, etc.

These petitions came on for hearing with reference to r. 37 of the Criminal Rules of Practice and Orders, 1931 and S. 476 of the Code of Criminal Procedure.

N. Rajagopala Aiyangar for *P. S. Raghavarama Sastri*, *K. S. Rajagopalachari* for *K. Rajah Aiyar* and *S. Ramachandran* for *R. Sundaralingam* for Petitioner.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) for Respondents.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—Three matters have been placed before this Full Bench and they can be dealt with conveniently in the same judgment as they all involve the same question. The first case arises out of a suit which was tried by the Subordinate Judge of Tinnevelly. The plaintiff contended that a post card which had been put in evidence by the first and second defendants on the allegation that it had been written by the third defendant to the second defendant was a false document. Subsequently the plaintiff filed an application asking the Court to prosecute the three defendants under the provisions of S. 476 of the Code of Criminal Procedure for offences alleged to have been committed under Ss. 463, 464, 471, 473 and 476 of the Indian Penal Code. The Court dismissed the application and the Subordinate Judge's decision was upheld by the judgment

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of the District Judge on appeal. The plaintiff has now asked this Court to revise the order of the District Judge under the provisions of Ss. 435 and 439 of the Code of Criminal Procedure and to direct the prosecution to take place. In the second case an application was made to the Court of the District Munsif of Tiruvarur by the petitioner, the assignee of a decree, to direct the prosecution of the respondents under Ss. 206 and 207 of the Indian Penal Code. The application was granted by the District Munsif, but the respondents appealed to the District Judge of East Tanjore, who reversed the order of the District Munsif. The petitioner asks that the order of the District Munsif be restored by this Court under its powers of revision under Ss. 435 and 439 of the Code of Criminal Procedure. The third matter arises out of an application filed by the second defendant in a suit in the Court of the Subordinate Judge of Mayavaram against the respondents. The application was rejected by the Subordinate Judge and on appeal to the District Judge of East Tanjore the decision was upheld. The petitioner asks this Court to direct under the provisions of S. 115 of the Code of Civil Procedure a complaint to be made.

R. 37 of the Criminal Rules of Practice and Orders of this Court provides that every application made to a Criminal Court under the provisions of Ss. 476, 476-A or 485, of the Code of Criminal Procedure and every appeal filed against an order made under these sections, or filed in a Court of Session against an order of a Court of Small Causes in the mufassal under S. 486 of the Code of Criminal Procedure shall be registered as a Criminal Miscellaneous Petition and a Criminal Appeal respectively. The rule further directs that such applications or appeals when filed in a Civil Court shall be registered as Civil Miscellaneous Petitions and Civil Miscellaneous Appeals respectively and states that the rule applies to revision petitions also. The question which the Court is called upon to decide is whether the petitions now under discussion shall be registered as Criminal or Civil Revision Petitions. In the recent case of *In re D. S. Raju Gupta*[1], Pandrang Row, J., held that the jurisdiction which is exercised by a Civil Court in filing a complaint under S. 476 of the Code of Criminal Procedure is a jurisdiction exercised under that Code and that revision petitions to this Court should be filed on the Criminal Side and not on the Civil Side. The learned Judge was of the

1. (1939) 1 M.L.J 480: I.L.R. (1939) Mad. 439.

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opinion that r. 37 was *ultra vires.* The question is one of considerable importance because the revisional powers of this Court under the Code of Criminal Procedure are greater than the powers conferred on it by S. 115 of the Code of Civil Procedure. Under the latter Code the Court can only interfere when a Subordinate Court appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity. Under S. 439 of the Code of Criminal Procedure the High Court has power to exercise any of the powers conferred on a Court of Appeal by Ss. 423, 426, 427 and 428, and therefore has the power to interfere on a question of fact when in its opinion the finding of a Subordinate Court is against the weight of evidence. The question now under discussion has been the subject of other decisions of this Court and has also been debated in most of the High Courts of India. I shall in due course refer to the cases which have been quoted to us in argument, but before doing so, it is desirable to refer in some detail to the sections of the Code of Criminal Procedure which have bearing on the question.

S. 195 (1) (*b*) of the Code as it now stands states that no Court shall take cognizance of any offence punishable under Ss. 194, 195, 196, 199, 200, 205 to 211 and 228 of the Indian Penal Code when the offence is alleged to have been committed in, or in relation to, a proceeding in Court, except on the complaint in writing of the Court or of some other Court to which the Court is subordinate. Sub-S. 1 (*c*) contains a similar provision with regard to an offence described in S. 463 or punishable under Ss. 471, 475 or 476 of the Indian Penal Code. Before the Code of Criminal Procedure was amended the section did not require the Court to file the complaint. It only required the Court to give its previous sanction to the complaint being filed. Sub-S. (3) of S. 195 reads as follows:—

"For the purposes of this section, a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within the local limits of whose jurisdiction such Civil Court is situate:

Provided that—

(*a*) Where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate; and

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(*b*) Where such appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed."

S. 476 states that when a Civil, Revenue or Criminal Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in S. 195, sub-S. (1), cl. (*b*) or clause (*c*) which appears to have been committed in or in relation to a proceeding in that Court, the Court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint in writing which shall be forwarded to a Magistrate of the first class having jurisdiction, whereupon the Magistrate shall proceed according to law and as if upon complaint made under S. 200. S. 476-A permits a superior Court to make the complaint where the subordinate Court has omitted to do so, and S. 476-B allows appeals from orders made on such matters by the subordinate Court. S. 476-B reads as follows:—

"Any person on whose application any Civil, Revenue or Criminal Court has refused to make a complaint under S. 476 or S. 476-A, or against whom such a complaint has been made, may appeal to the Court to which such former Court is subordinate within the meaning of S. 195, sub-S. (3), and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint or, as the case may be, itself make the complaint which the subordinate Court might have made under S 476 and if it makes such complaint, the provisions of that section shall apply accordingly."

I have already referred in general terms to S. 439 of the Code, but it is necessary to examine its provisions more closely in conjunction with the provisions of S. 435. S. 435 states that the High Court or any Sessions Judge or District Magistrate or any Sub-Divisional Magistrate empowered by the Local Government in this behalf may call for and examine the record of a proceeding before an inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the inferior Court. The section only gives power to call for the record of a proceeding before an inferior Criminal Court. S. 439 reads as follows:—

"(1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise

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comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Ss 423, 426, 427 and 428 or on a Court by S. 338, and may enhance the sentence; and when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by S. 429.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under S. 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed, than might have been inflicted for such offence by a Presidency Magistrate or a Magistrate of the First Class.

(4) Nothing in this section applies to an entry made under S. 273, or shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

(6) Notwithstanding anything contained in this section any convicted person to whom an opportunity has been given under sub-S. (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction."

Although the section does not in terms say that the High Court's power of revision is confined to criminal cases it seems to me to be obvious that the section is not intended to travel beyond cases in Criminal Courts. Sub-S. (1) states that when the record has been called for the Court may enhance the "sentence". Sub-S. (2) says that no order under the section shall be made to the prejudice of "the accused" unless he has had an opportunity of being heard. Sub-S. (3) deals with the matter of "sentence". Sub-S. (4) provides that nothing in the section applies to an entry made under S. 273 of the Code or be deemed to authorize the Court to convert a finding of "acquittal" into one of "conviction", and sub-S. (5) prohibits the Court from exercising revisional powers where the Code gives the right of appeal and no appeal has been preferred.

The only other section which calls for mention before proceeding to examine the authorities is S. 478, which is to the effect that when any offence contemplated by S. 195 is committed before a Civil or Revenue Court, or is brought under the notice of a Civil or Revenue Court, in the course of a judicial proceeding, and the case is triable exclusively by the High Court or Court of Session, or the Civil or Revenue Court thinks that it ought to be tried by the High Court or

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Court of Session, the Civil or Revenue Court may, instead of sending the case under S. 476 to a Magistrate for inquiry, itself complete the inquiry, and commit or hold to bail the accused person to take his trial before the High Court or Court of Session, as the case may be. For the purpose of an inquiry under this section the Civil or Revenue Court may exercise all the powers of a Magistrate and its proceedings in such inquiry shall be conducted as nearly as may be in accordance with the provisions of Chapter XVIII and of Chapter XXXIII in cases where that Chapter applies and shall be deemed to have been held by a Magistrate. The fact that the Legislature considered that in such a case the Civil or Revenue Court should be given the powers of a Magistrate is not without significance. The section shows that in holding the inquiry it is still a Civil Court and it is necessary to give it the authority of a Magistrate for the purpose.

R. 37 of the Criminal Rules of Practice of this Court is based on the judgment of Bhashyam Aiyangar, J., in *In re Chennanagoud*[1]. The learned Judge was firmly of the opinion that the High Court cannot, under the provisions of Ss. 435 and 439 of the Code of Criminal Procedure, revise an order passed by any Court other than a Criminal Court under cl. (*b*) or (*c*) of sub-S. (1) of S. 195 of the Code according sanction for the prosecution of any person who is alleged to have committed any of the offences referred to in that section. When the judgment of Bhashyam Aiyangar, J., was delivered the Code of Civil Procedure, 1882, was in force and the corresponding section to S. 115 of the present Code was S. 622. While he was of the opinion that the provisions of the Code of Criminal Procedure could not be invoked when there were proceedings in a Civil Court under Ss. 195 and 476 of the Code of Criminal Procedure he recognized that in a proper case the High Court would have powers of revision under the Code of Civil Procedure.

In *Raghunatha Patro* v. *Govinda Patro*[2], this Court held that it had no power under S. 115 of the Code of Civil Procedure to interfere in revision with the decision of a Revenue Court, and since that case was decided this Court has not revised decisions of Revenue Courts unless the case was of a

1. (1902) I.L.R. 26 Mad. 139. 2 (1928) 55 M.L.J. 798 (F.B.).

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nature which justified the issue of a writ of *certiorari*. In *Rajah of Mandasa* v. *Jagannayakulu*[1], which was decided by a Full Bench, doubts were cast on the correctness of the decision in *Raghunatha Patro* v. *Govinda Patro*[2], except so far as Ch. XI of the Madras Estates Land Act, 1908, was concerned, but that decision has been not overruled and has in fact since been followed. On the other hand, the Calcutta High Court has from early days considered that it had power to revise decisions of Revenue Courts. In his judgment in *In re Chennanagouda*[3], Bhashyam Aiyangar, J., observed that as this Court had no power to interfere with the decision of a Revenue Court under S. 195 of the Code of Criminal Procedure it was difficult to see on what principle similar proceedings of a Civil Court could be revised under S. 439 of the Code of Criminal Procedure. It has been suggested in the present case that as this Court has no power to interfere with the decision of a Revenue Court it would mean, if the view of Bhashyam Aiyangar, J, is to prevail, that an order of a Revenue Court directing proceedings to be instituted for an offence referred to in S. 195 of the Code of Criminal Procedure or an order refusing to institute proceedings would not be subject to revision at all. This may very well be the case, but because the legislature has failed to provide for such an eventuality the Court cannot step in and remedy the defect. That must be left to the legislature.

It was held by a Bench of three Judges of this Court (*Oldfield, Sadasiva Aiyar* and *Seshagiri Aiyar, JJ.*) in *King-Emperor* v. *Karri Venkanna Patrudu*[4], that on an application for revision of an order of a Civil Court granting sanction to prosecute under S. 476 of the Code of Criminal Procedure the Court's powers of interference are limited to S. 115 of the Code of Civil Procedure and therefore the High Court cannot interfere under S. 439 of the Code of Criminal Procedure. It is true that Sadasiva Aiyar, J., expressed doubt as to the correctness of the decision of Bhashyam Aiyangar, J., in *In re Chennanagouda*[3], but as the practice of treating such matters as being of the nature of Civil Revision Petitions had existed for fourteen years in this Province he did not wish to reopen the question. This decision must be regarded as expressing the law

1. (1931) 63 M.L.J. 450: I.L.R. 55 Mad. 883 (F.B.).
2. (1928) 55 M.L.J. 798 (F.B.).
3. (1902) I.L.R. 26 Mad. 139.
4. (1916) 31 M.L.J. 440 (F.B.).

in this Province unless it is overruled by a Bench of greater strength or the Legislature interferes.

In *Janardhana Rao* v. *Lakshmi Narasammal*[1], a Bench composed of Beasley, C.J. and Bardswell and Burn, JJ., held that in an appeal under S. 476-B of the Code of Criminal Procedure in a civil proceeding the appellate Court has power, under cls. (*c*) and (*d*) of S. 423 of that Code to remand the matter to the lower Court for proper disposal. The application of the Code of Criminal Procedure is certainly not in keeping with the decision in *King-Emperor* v. *Karri Venkanna Patrudu*[2], but as Bardswell, J., who delivered the judgment of the Bench in *Janardhana Rao* v. *Lakshmi Narasammal*[1], said that it was unnecessary to discuss whether the proceedings of a Civil Court under S. 476-B could be revised by a High Court under S. 439 of the Code of Criminal Procedure, and this in spite of the fact that *King-Emperor* v. *Karri Venkanna Patrudu*[2], was mentioned in the Order of Reference, the conclusion is that it was not intended to question the authority of that decision, illogical though this may be. The basis of the decision in *Janardhana Rao* v. *Lakshmi Narasammal*[1], was that the matter was of a criminal rather than of a civil character, but if this were the governing factor, the decision in *King-Emperor* v. *Karri Venkanna Patrudu*[2], would be wrong. The Bench which decided *Janardhana Rao* v. *Lakshmi Narasammal*[1] could not overrule the decision in the *King-Emperor* v. *Karri Venkanna Patrudu*[2] and did not purport to do so.

In holding in *In re D. S. Raju Gupta*[3], that the jurisdiction which is exercised by a Civil Court in filing a complaint under S. 476 of the Code of Criminal Procedure is a jurisdiction exercised under that Code and is of a criminal nature. Pandrang Row, J., also did not consider the ruling of the Full Bench in *King-Emperor* v. *Karri Venkanna Patrudu*[2] or the judgment of Bhashyam Aiyangar, J., in *In re Chennanagouda*[4]. His judgment was based on *Janardhana Rao* v. *Lakshmi Narasammal*[1], and on the decision of the Lahore High Court in *Dhanpat Rai* v. *Balak Ram*[5] and that of the Bombay High Court in *Emperor* v. *Bhatu Sadu*[6].

1. (1933) 65 M.L.J. 873: I.L.R. 57 Mad. 177 (F.B.).
2. (1916) 31 M.L.J. 440 (F.B.).
3. (1939) 1 M.L.J. 480: I.L.R. (1939) Mad. 439.
4. (1902) I.L.R. 26 Mad. 139.
5. (1931) I.L.R. 13 Lah. 342 (F.B.).
6. I.L.R. (1938) Bom. 331 (F.B.).

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The opinion of the Calcutta High Court is in agreement with the opinion of this Court as expressed in *In re Chennanagouda*[1] and *King-Emperor* v. *Karri Venkanna Patrudu*[2]. In *Emperor* v. *Har Prasad Das*[3], a Full Bench of five Judges (*Jenkins, C. J.* and *Harrington, Stephen, Asutosh Mookerjee* and *Holmwood, JJ.*), held that where an order has been passed by a Civil Court under S. 476 of the Code of Criminal Procedure, S. 439 has no application. The High Court can only exercise the revisional powers under S. 115 of the Code of Civil Procedure. This decision was accepted without question in *Surendranath Maiti* v. *Sushilkumar Chakrabarti*[4].

The opinion of the Bombay High Court expressed in *Emperor* v. *Bhatu Sadu*[5] was also that of a Full Bench. The Court held that the reference in S. 476-B to S. 195 (3) of the Code of Criminal Procedure only determined the forum and not the character of the Court. It was considered that a Civil Court in passing an order under S. 476-B was exercising jurisdiction in a criminal matter, and therefore its order could be revised under S. 439 of the Code of Criminal Procedure.

A Full Bench of three Judges of the Allahabad High Court discussed the question in *In the matter of the Petition of Bhup Kunwar*[6]. Two of the learned Judges (*Stanley, C.J.* and *Blair, J.*) were of the opinion that in a proceeding under S. 476 of the Code of Criminal Procedure arising out of a civil suit the Court had no jurisdiction to revise under S. 439 of that Code, but the third learned Judge (*Banerji, J.*) was of the contrary opinion. *Banerji, J.*, considered that as S. 439 gave the High Court the right in "any proceeding" to exercise the powers conferred on a Court of Appeal the section must be deemed to apply to a proceeding in a Civil Court as well as to a proceeding in a Criminal Court. He refused to read S. 439 in conjunction with S. 435. I do not consider that S. 439 can be read alone, but even when read alone I consider that there is strong indication that it has reference only to criminal proceedings as I have already pointed out.

The practice of the Lahore High Court has been to treat revision petitions as falling within S. 439 of the Code of Criminal Procedure irrespective of whether the order under

1. (1902) I.L.R. 26 Mad. 139.
2. (1916) 31 M.L.J. 440 (F.B.)
3. (1913) I.L.R. 40 Cal. 477 (F.B.).
4. (1931) I L R. 59 Cal. 68
5. I.L.R. (1938) Bom. 331 (F.B.).
6. (1903) I.L.R. 26 All. 249 (F.B.).

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revision was passed by a Civil, Criminal or Revenue Court and in *Dhanpat Rai* v. *Balak Ram*[1], a Full Bench decided that the practice should not be departed from.

I have said enough to indicate that there has been a great divergence of opinion on the question, but so far as this Court is concerned, it is at present governed by the decision in *King-Emperor* v. *Karri Venkanna Patrudu*[2], and this Bench has no power to reverse that decision. Nor do I think it should do so, even if it had the power. As I have indicated, S. 439 only applies to cases which come before the Criminal Courts within the meaning of the Code of Criminal Procedure. In my opinion a Civil Court does not cease to be a Civil Court when it is considering an application made to it under S. 476, and if for the purposes of that application it remains a Civil Court it must be governed by the provisions of the Code of Civil Procedure and not by those of the Code of Criminal Procedure. The fact that an appeal from an order passed on an application when it has been dealt with by a Civil Court lies to an appellate Civil Court emphasizes the civil character of the Court dealing with the application. In the wording of the relevant sections of the Code of Criminal Procedure, I can find no justification for regarding the Court as being anything but a Civil Court. The position is not a satisfactory one because an application for revision arising out of proceedings in a Civil suit must be dealt with on a different basis from a similar application arising out of criminal proceedings, but it is a situation which the Court cannot remedy, but only regret. It is a situation which the Legislature alone can deal with and I trust that in the near future action will be taken.

I hold that the petitions now before the Court should be numbered as Civil Revision Petitions and dealt with on that basis.

King, J.

King, J:— I agree.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.:—I entirely agree, but inasmuch as it has been suggested in *Dhanpat Rai* v. *Balak Ram*[1], per Tekchand, J., that the reasons given by Bannerji, J., in his dissenting judgment in *In the matter of the Petition of Bhup*

1. (1931) I.L.R. 13 Lah. 342 (F.B.).
2. (1916) 31 M.L.J. 440 (F.B.).

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Kunwari, have not been met, I desire to add a few words. So far as that judgment relied on the practice which then obtained in the Allahabad High Court, it is enough to say that the practice here has been different. In fact it appears that whichever view found acceptance at the hands of the learned Judges who have had to consider the point, it was the result to a large extent of the practice prevalent in the particular Court which was also no doubt sought to be supported by a consideration of the language of the statute. To my mind, the dominant consideration however appears to have been furnished in almost every one of the decided cases by the existing practice of the Court concerned. It will not altogether be out of place for me to examine the correctness of the opposite view, in so far as it has been sought to be supported by what has been called the wider language employed in S. 439, as compared with S. 435. The suggestion is that whereas the power to call for records, is restricted by S. 435, to the proceedings *of an inferior Criminal Court alone,* such a restriction does not find place in S. 439, which confers the power of revision, on the High Court. That power is given it is said in the case of *any* proceeding not necessarily the proceeding of an inferior Criminal Court, the record of which has been called for by the High Court, or which has been reported for its orders, or which otherwise comes to its knowledge. In other words, the argument is that while the High Court's power to call for records is a limited power under S. 435, limited, it is said, to the proceedings of an inferior Criminal Court, the opening words "in the case of *any* proceedings" in S. 439 standing unqualified by any such limitation, implies a larger power, that is, a power to revise the proceedings of all subordinate Courts Civil as well as Criminal. I am not however satisfied that there is any substance in this argument. It will be seen on examination, that the whole Chapter in which these two sections occur, is concerned with the subject of reference and revision and regulates the relative procedure to be followed with respect to the proceedings of inferior Criminal Courts only. All the sections in this Chapter, except three, namely, Ss. 439, 440 and 442, refer expressly to subordinate Criminal Courts. The two latter sections are purely procedural,

1. (1903) I.L.R. 26 All. 249 (F.B.).

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relating respectively to the right of audience, and the necessity for certification of the order passed in revision to the subordinate Court concerned. If we leave them out of account, S. 439 would, if the argument were sound, remain the solitary exception in a Chapter, which but for this exception, is concerned purely with the orders of Criminal Courts; and I am naturally disinclined to adopt such a construction unless the language is sufficiently express for the purpose.

S. 439 posits a situation in which, the records have been called for under S. 435, or a report received under S. 438, or a proceeding of a subordinate Court *otherwise* come to the knowledge of the High Court. By these three modes or any of them, information has to reach the High Court, before it can proceed to exercise its power of revision. Plainly here a multiplicity of channels of information is alone contemplated, and not a multiplicity in the nature or character of the information itself on which the High Court is to act. The records of an *inferior Criminal Court alone,* can be called for under S. 435. The report under S. 438 can again only be in respect of the proceedings of such a Court. Logically it would seem that it must be the proceedings of a similar Court but coming *otherwise* to its knowledge that the High Court is empowered by S. 439, to revise. In other words, the section postulates an identity in the nature and character of the proceedings subjected to its revision though there may be a variety in the means of information. The words "or otherwise" occur in Ss. 436, 437 and 438 in connection with "any record", "any case" and "any proceeding" respectively, and in these contexts it is impossible to imagine Courts other than inferior Criminal Courts being intended. I am constrained to hold, on a comprehensive consideration of the object and scope of the Chapter, and of the wording of the sections themselves taken as a whole and not in isolation, that there is no support for the opposite construction.

K. S. *Petitions directed to be numbered as Civil Revision Petitions.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KING AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Chikkanna Chettiar *alias* V. S. Nanjappa Chettiar .. *Petitioner** (*Appellant*)

v.

V. S. Perumal Chettiar and another .. *Respondents* (*Respondents*).

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Chikkanna Chettiar *v.* Perumal Chettiar.

Land Acquisition Act (I of 1894), S. 3 (d)—Decision of Subordinate Judge appointed under—Appealability under Civil Procedure Code.

The decision of the Subordinate Judge as a judicial officer appointed by the local Government under S. 3 (*d*) of the Land Acquisition Act to perform the functions of the Land Acquisition Court is a decree and is appealable under the Civil Procedure Code in the ordinary way.

Ramachandra Rao v. *Ramachandra Rao*, (1922) 43 M.L.J. 78: L.R. 49 I.A. 129: I.L.R. 45 Mad. 320 (P C.) and *Bhagwati* v. *Ram Kali*, (1939) 2 M.L.J. 98 I.L.R. 1939 All. 460: 66 I.A. 145 (P.C.), relied on. *Raja of Sivaganga* v. *Karuppiah*, (1938) 49 L.W. 238 approved.

Rajagopala Chettiar v. *The Hindu Religious Endowments Board, Madras*. (1933) 66 M.L.J. 43: I.L.R. 57 Mad. 271 (F.B.), no longer authoritative.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the decree of the District Court of Salem in A. S. No. 20 of 1935 preferred against the decree in L.A.C. No. 3 of 1931 on the file of the Court of the Subordinate Judge of Salem.

K. Narasimha Aiyangar and *D. Ramaswamy Aiyangar* for Petitioner.

T. M. Krishnaswamy Aiyar and *A. Balasubramania Aiyar* for Respondents.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—This revision petition raises the question whether an appeal lies from the decision of a Subordinate Judge appointed by the Provincial Government under S. 3 (*d*) of the Land Acquisition Act, 1894, to decide a dispute referred by the Collector under S. 30 of the Act. That section empowers the Collector to refer to "the Court" a dispute as to the apportionment of the amount of compensation settled under S. 11 or as to the persons to whom the compensation is payable. S. 3 (*d*) defines the word "Court" as meaning a principal Civil Court of original jurisdiction, unless the Pro-

*C. R. P. No. 729 of 1938. 23rd February, 1940.

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vincial Government has appointed (as it is empowered to do) a special judicial officer to perform the functions of the Court. In this case the Government of Madras appointed the Subordinate Judge of Salem to perform the functions of the Court under the Act. The petitioner was dissatisfied with the decision of the Subordinate Judge and filed an appeal to the District Judge of Salem, but the District Judge dismissed the appeal on the ground that it was incompetent by reason of the decision of this Court in *Krishnamoorthi Aiyar* v. *The Special Deputy Collector of Land Acquisition, Kumbakonam*[1]. The petitioner conceded that this was the effect of the decision, but he contends that it does not correctly state the law. He says that the judgments of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao*[2] and *Bhagwati* v. *Ram Kali*[3] leave no doubt that an appeal does lie.

Before proceeding to examine the authorities which have been quoted to us in the course of the arguments I will refer to other provisions of the Land Acquisition Act which have bearing on the question under discussion. S. 18 says that any person who has not accepted an award may require the Collector to refer the matter for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the person to whom it is payable, or the apportionment of the compensation among the persons interested. Therefore a person interested can require the Collector to refer a dispute as to the apportionment to the Court, just as the Collector may refer it on his own initiative under the provisions of S. 30. As the result of the decision of the Privy Council in *Rangoon Botatoung Company Limited* v. *The Collector, Rangoon*[4], S. 26 of the Act was amended, and it is now provided that an award made under S. 18 shall be deemed to be a decree and the statement of the grounds of the award a judgment within the meaning of S. 2, Cl. (2) and S. 2, Cl. (9), respectively, of the Code of Civil Procedure, 1908. The effect of this amendment is to bring the award within the purview of S. 54. S. 31 says that on making an award under S. 11 (which relates to the inquiry into the area of the land, the compensation payable for it, and the apportionment of the compensation) the

1. (1935) 71 M.L.J. 76: I.L.R. 59 Mad. 554.
2. (1922) 43 M.L.J. 78: L.R. 49 I.A. 129: I.L.R. 45 Mad. 320 (P.C.).
3. (1939) 2 M.L.J. 98: L.R. 66 I.A. 145: I.L.R. 1939 All. 460 (P.C.).
4. (1912) 23 M.L.J. 276: L.R. 39 I.A. 197: I.L.R. 40 Cal. 21 (P.C.).

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Collector shall pay the compensation awarded by him to the persons entitled thereto, unless prevented by one or more of the following contingencies:—(i) If they shall consent to receive it, (ii) or if there be no person competent to alienate the land; or (iii) if there be any dispute as to the title to receive the compensation or as to the apportionment of it. In such circumstances the Collector shall deposit the amount of the compensation in the Court to which a reference under S. 18 would be submitted. S. 53 says that save in so far as they may be inconsistent with anything contained in the Act the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under the Act. S. 54 reads as follows:—

"Subject to the provisions of the Code of Civil Procedure, 1908, applicable to appeals from original decrees, and notwithstanding anything to the contrary in any enactment for the time being in force, an appeal shall lie only in any proceedings under this Act to the High Court from the award, or from any part of the award, of the Court and from any decree of the High Court passed on such appeal as aforesaid an appeal shall lie to His Majesty in Council subject to the provisions contained in S. 110 of the Code of Civil Procedure, 1908 and in O. 45, thereof.

The petitioner says that a judicial officer appointed under S. 3 (*d*) constitutes a Court and that by virtue of the provisions of S. 53 and of the saving words "Subject to the provisions of the Code of Civil Procedure, 1908 applicable to appeals from original decrees" which precede the restrictive provisions of S. 54, there is a right of appeal.

In *Ramachandra Rao* v. *Ramachandra Rao*[1] a dispute arose as to the apportionment of compensation awarded by the Collector. This dispute was decided by the District Court of Tanjore and resulted in an appeal to this Court. In a subsequent suit the title to the land with which the acquisition proceedings were concerned was again disputed and it was this suit which gave rise to the appeal to the Judicial Committee. The area in the subsequent suit was larger than the area with which the proceedings were concerned, but this did not affect the question of title. The Judicial Committee held that the decision of this Court on appeal from the District Court's order of apportionment operated as *res judicata*. It was argued that the decision of this Court in the proceedings arising out of the land acquisition case could not be regarded as a decree, but their Lordships

1. (1922) 43 M.L.J. 78: L.R. 49 I.A. 129: I.L.R. 45 Mad. 320 (P.C.).

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said that how the proceedings were commenced was a matter which was not material, provided that they were instituted in the manner that gave the Court jurisdiction "for they ended in a decree made by the High Court and appealable to this Board". The Board in effect held that the decision of the District Judge amounted to a decree and that the decision of this Court was a decree appealable to the Board. As the proceedings had resulted in a decree which had decided the question raised in the subsequent suit the decree operated as *res judicata.* The ground of the decision was stated in these words:—

"Such dispute" (the dispute regarding apportionment) "forms no part of the award and it would indeed be strange if a controversy between two people as to the nature of their respective interests in a piece of land should enjoy certain rights of appeal, which would be wholly taken away when the piece of land was represented by a sum of money paid into Court."

In *Bhagwati* v. *Ram Kali*[1], the Privy Council considered the judgment in *Ramachandra Rao* v. *Ramachandra Rao*[2], and re-affirmed it. Delivering the judgment of the Board, Lord Porter said:

"In order successfully to establish a plea of *res judicata* or estoppel by record it is necessary to show that in a previous case a Court having jurisdiction to try the question came to a decision necessarily and substantially involving the determination of the matter in issue in the latter case.

It was at one time a matter of doubt in India whether the determination of a Court to which a matter has been referred by the Collector under S. 18 of the Land Acquisition Act was such a decision. That doubt was resolved by the judgment of this Board in *Ramachandra Rao* v. *Ramachandra Rao*[2], which decided that where a dispute as to the title to receive the compensation has been referred to the Court, a decree thereon not appealed from renders the question of title *res judicata* in a suit between the parties to the dispute. In that case some question arose as to whether any appeal lay to His Majesty in Council in a case where the determination of the Judge ended in an award and not in a decree. The Board took the view that where the matter referred was not the adequacy of the amount of compensation awarded, but a dispute between the persons claiming compensation, involving it may be, difficult questions of title, the resultant decision was not an award but a decree."

It will now be convenient to refer to the other authorities which have been referred to in argument. In *Mahalinga Kudumban* v. *Theetharappa Mudaliar*[3], Devadoss and Jackson, JJ., held that an order passed by a Subordinate Judge on a reference under S. 30 of the Land Acquisition Act was a decree within the meaning of S. 2 (2) of the Code of Civil Procedure

1. (1939) 2 M.L.J. 98: L.R. 66 I.A. 145: I.L.R. 1939 All. 460 (P.C.).
2. (1922) 43 M.L.J. 78: L.R. 49 I.A. 129: I.L.R. 45 Mad. 320 (P.C.).
3. (1928) 56 M.L.J. 387.

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and an appeal lay from it under S. 96 of the Code, which provides that an appeal shall lie from every decree passed by a Court exercising original jurisdiction to the Court authorised to hear appeals. S. 13 of the Madras Civil Courts Act, 1873, says that regular or special appeals shall, when such appeals are allowed by law, lie from the decrees and orders of a District Court to the High Court and that appeals from the decrees and orders of Subordinate Judges and District Munsifs shall, when such appeals are allowed by law, lie to the District Court, except when the amount or value of the subject matter of the suit exceeds Rs. 5,000, in which case the appeal shall lie to the High Court. In *Mahalinga Kudumban* v. *Theetharappa Mudaliar*[1], the Court considered the decision of the Privy Council in *Rangoon Botatoung Company, Ltd.* v. *The Collector, Rangoon*[2], and *Ramachandra Rao* v. *Ramachandra Rao*[3]. The Land Acquisition Act was similarly interpreted by Ramesam and Venkatasubba Rao, JJ., in *Venkatareddi* v. *Adinarayana Rao*[4], which also had reference to an order of a Subordinate Judge under S. 30. Varadachariar and Burn, JJ., followed *Venkatareddi* v. *Adinarayana Rao*[4], in *Appaswami Vannian* v. *Velu Vaidyan*[5].

There are three decisions of this Court which are in conflict with those I have mentioned, namely, *Mahant Bhagvati Doss Bavaji* v. *Sarangaraja Iyengar*[6], *Rajagopala Chettiar* v. *The Hindu Religious Endowments Board, Madras*[7], and *Krishnamoorthi Aiyar* v. *The Special Deputy Collector of Land Acquisitions, Kumbakonam*[8]. In the first of these cases Wallace and Stone, JJ., held that where the Chief Judge of the Court of Small Causes, Madras, had been appointed the special Judicial Officer under S. 3 (*d*) of the Land Acquisition Act, he did not constitute a "principal Civil Court of Original Jurisdiction" within the meaning of that section, but was a special Court having its own statutory status which did not follow the status of the Court ordinarily presided over by the person who

1. (1928) 56 M.L.J. 387.
2. (1912) 23 M.L.J. 276: L.R. 39 I.A. 197: I.L.R. 40 Cal. 21 (P. C.).
3. (1922) 43 M.L.J. 78: L.R. 49 I.A. 129: I.L.R. 45 Mad. 320.
4. (1928) 56 M.L.J. 357: I.L.R. 52 Mad. 142.
5. (1934) 40 L.W. 37.
6. (1931) 61 M.L.J. 312: I.L.R. 54 Mad. 722.
7. (1933) 66 M.L.J. 43: I.L.R. 57 Mad. 271.
8. (1935) 71 M.L.J. 76: I.L.R. 59 Mad. 554.

happened to be appointed as its Judge. What the learned Judges here evidently had in mind was that the special judicial officer was the Chief Judge of the Court of Small Causes, a Court governed by a special Act of the Legislature which gives no right of appeal to another Court. An appeal from the decision of a Single Judge lies to a Bench of Judges of the Court of Small Causes and the High Court has only powers of revision. It is not necessary to pause to consider whether the judgment in that case is open to question as different considerations apply from those which apply in the present case.

Rajagopala Chettiar v. *The Hindu Religious Endowments Board, Madras*[1], was decided by a Full Bench consisting of Madhavan Nair, Jackson and Lakshmana Rao, JJ., and the case had reference to the question whether there was an appeal to the High Court either under the Madras Hindu Religious Endowments Act, 1926, or under the Code of Civil Procedure, from an order passed by the District Judge under S. 84 (2) of the Madras Hindu Religious Endowments Act. The provisions of that Act have nothing really in common with the provisions of the Land Acquisition Act, but in *Rajagopala Chettiar* v. *The Hindu Religious Endowments Board, Madras*[1], the effect of the judgment of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao*[2], was discussed at length, and the respondent places great reliance on the observations made by Madhavan Nair, J., as they are to the effect that the Privy Council was only considering whether the order of this Court on appeal constituted a decree within the meaning of the Code of Civil Procedure of 1882. Under the Code of 1882 the word 'decree' was defined as 'the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court when such adjudication so far as regards the Court expressing it, decides the suit or appeal'. The words 'or appeal' have been omitted from the present Code and the Full Bench considered that the presence of these words made all the difference. If the Court had to decide the present petition in the light of the interpretation of *Ramachandra Rao* v, *Ramachandra Rao*[2], in *Rajagopala Chettiar* v. *The Hindu Religious Endowments Board, Madras*[1], we should be bound to hold that an appeal does not lie in a case like the present one.

1. (1933) 66 M.L.J. 43: I.L.R. 57 Mad. 271.
2. (1922) 43 M.L.J. 78: L.R. 49 I.A. 129: I.L.R. 45 Mad. 320 (P.C.).

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But the matter does not rest there, because in *Bhagwati* v. *Ram Kali*[1], the Privy Council considered its decision in *Ramachandra Rao* v. *Ramachandra Rao*[2], in a case which arose after the Code of 1908 came into force, and it has reaffirmed it. *Krishnamoorthy Aiyar* v. *The Special Deputy Collector of Land Acquisition, Kumbakonam*[3], was decided by Madhavan Nair and Stone JJ., and the same view of the effect of the decision in *Ramachandra Rao* v. *Ramachandra Rao*,[2] was taken. The fact that this opinion was expressed in a case relating to the decision of a special judicial officer appointed under S. 3 (*d*) of the Land Acquisition Act led to the conclusion of the Court below that it was binding in the present case.

The latest decision of this Court is that of King, J., in *Raja of Sivaganga* v. *Karuppiah*[4], and was decided after the District Judge had dismissed the petitioner's appeal. This was a reference to the Subordinate Judge under S. 30 of the Land Acquisition Act relating to dispute between a Zamindar and a number of ryots with regard to the distribution of compensation awarded in respect of land which had been acquired. My learned brother, King, considered that the case was governed by the decision of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao*[2], and held that an appeal lay, an opinion which I share, although had it not been for the decision of the Privy Council in *Bhagwati* v. *Ram Kali*,[1] I should have felt constrained to hold that the interpretation of *Ramachandra Rao* v. *Ramachandra Rao*[2], by the Full Bench in *Rajagopala Chettiar* v. *The Hindu Religious Endowments Board, Madras*[5], was binding on us.

In my opinion all controversy is set at rest by the judgment of the Privy Council in *Bhagwati* v. *Ram Kali*[1]. The opinion expressed in *Ramachandra Rao* v, *Ramachandra Rao*[2], was there reaffirmed, notwithstanding the alteration made by the present Code in the definition of the word 'decree'. In the light of the recent pronouncement of the Privy Council, *Ramachandra Rao* v. *Ramachandra Rao*[2], must be taken to decide

1. (1939) 2 M.L.J. 98: L.R. 66 I.A. 145: I.L.R. 1939 All. 460 (P.C.).
2. (1922) 43 M.L.J. 78: L.R. 49 I.A. 129: I L.R. 45 Mad. 320 (P.C.).
3. (1935) 71 M.L.J. 26: I.L.R. 59 Mad. 554.
4. (1938) 49 L.W. 238.
5. (1933) 66 M.L.J. 43: I.L.R. 57 Mad. 271.

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that an order, not merely the order on appeal, but an order determining a reference under S. 18 or under S. 30—it is admitted that there is no difference in principle between the two sections—is to be regarded as a decree and not as an award. It follows that the interpretation in *Ramachandra Rao* v. *Ramachandra Rao*[1], given by the Full Bench in *Rajagopala Chettiar* v. *The Hindu Religious Endowments Board, Madras*[2], can no longer be regarded as being authoritative.

It has been conceded by Mr. T. M. Krishnaswami Aiyar on behalf of the respondent that a judicial officer appointed under S. 3 (*d*) cannot be regarded as a *persona designata* and that he constitutes a Civil Court. But he says that it is a special Court, not one of ordinary civil jurisdiction and therefore a right of appeal must be given by the Act under which the Court is constituted or by some other express provision. That the judicial officer who is appointed by the Provincial Government to take the place of the District Judge constitutes a Civil Court was recognised in *Krishnamoorthy Aiyar* v. *The Special Deputy Collector of Land Acquisition, Kumbakonam*[3]. In *National Telephone Co., Ltd.* v. *His Majesty's Post-Master General*[4], Lord Shaw of Dunfermline pointed out that in the general case, when a Court of Record becomes possessed, by force of agreement and statute, of a reference to it of differences between parties, the whole of the statutory consequences of procedure before such a Court ensue. The Subordinate Judge who is appointed under S. 3 (*d*) of the Land Acquisition Act to decide a dispute with regard to the allocation of compensation money does not constitute a Court of record, but admittedly he does constitute a Civil Court and on the strength of the decision in the *National Telephone Company's case*,[4] it might reasonably be argued that the proceedings before him are governed by the provisions of the Code of Civil Procedure. Support for this argument is to be obtained from the judgment of the Privy Council in *Secretary of State for India* v. *Chelikani Rama Rao*[5]. There a claimant whose claim was rejected by the forest settlement officer appealed to the District Court under the Madras Forest Act 1882, which makes no provision

1. (1922) 43 M.L.J. 78: L.R. 49 I.A. 129: I.L.R. 45 Mad. 320 (P.C.).
2. (1933) 66 M.L.J. 43: I.L.R. 57 Mad. 271.
3. (1935) 71 M.L.J. 76: I.L.R. 59 Mad. 554.
4. (1913) A.C. 546.
5. (1916) 31 M.L.J. 324: L.R. 43 I.A. 192: I.L.R. 39 Mad. 617 (P.C.).

F.B.

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for a second appeal and consequently it was contended that there was no right of further appeal. Their Lordships refused to accept this contention, holding that when proceedings of this character reach the District Court that Court is appealed to as one of the ordinary Courts of the country with regard to whose procedure, orders and decrees, the ordinary Rules of the Code of Civil Procedure apply. It is not going much further to say that the same principle applies when an Act like the Land Acquisition Act provides for reference of disputes to the District Court and gives the Provincial Government power to substitute for the District Judge another judical officer who admittedly decides the dispute as a Civil Court. The argument that there is here a right of appeal is made all the stronger by the provisions of Ss. 53 and 54 of the Act. Any controversy, however, is settled by the decision of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao*,[1] and *Bhagwati* v. *Ram Kali*.[2]

I would allow this petition and remit the case to the District Judge with the direction that he shall hear and decide the petitioner's appeal in accordance with law. The petitioner is entitled to his costs.

King, J.

King, J.:—I agree.

Krishnaswami Ayyangar. J.

Krishnaswami Ayyangar, .:—I agree.

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GENTLE.

Sengamuthu Gounder .. *Appellant* (Plaintiff)*:

v.

Thayarammal and others .. *Respondents (Defendants 3, 1 and 2).*

Sengamuthu Gounder v. Thayarammal.

Mortgage—Prior mortgagee failing to join second martgagee in his suit —Second martgagee's suit for possession of property and sale—Resistance—First mortgagee's claim whether could be a shield against second mortgagee's claim, if second mortgagee's suit was brought beyond the time of limitation allowed the prior mortgagee.

The failure to join the second mortgagee in a suit by the first mortgagee does not give to the former any further rights which he did not possess so as

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1. (1922) 43 M.L.J. 78: L.R. 49 I.A. 129: I.L.R. 45 Mad. 320 (P.C.).
2. (1939) 2 M.L.J. 98: L.R. 66 I.A. 145: I.L.R. 1939 All. 460 (P.C.).

*S. A. No. 706 of 1935. 22nd February, 1939.

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to entitle the second mortgagee to ignore the existence of the first mortgage.

Where a first mortgagee having failed to join the second mortgagee in his suit upon the mortgage and having obtained a decree purchased the property in the subsequent auction sale and having got possession of the same set up the claims of a prior mortgagee against the second mortgagee's suit for possession and sale of the mortgaged property,

Held, that following *Karuppan Chettiar* v. *Venkataperumal*, A.I.R. 1929 Mad. 465 and the authorities to a like effect, the first mortgagee was entitled to resist the claim of the second mortgagee under his puisne mortgage, by relying upon and using the prior mortgage as a defence or a shield, although by the date when the second mortgagee's suit was filed the period of limitation of the earlier mortgage had expired and although the second mortgagee had not been made a party to the first mortgagee's suit upon his prior mortgage.

Krishna Aiyar v. *Subba Reddiar*, (1939) 1 M.L.J. 770, dissented from.

Case-law reviewed and discussed.

Appeal against the decree of the District Court of Trichinopoly in A. S. No. 239 of 1934 preferred against the decree of the Court of the District Munsif (Principal) of Trichinopoly in O. S. No. 368 of 1934.

K. V. Sesha Aiyangar for Appellant.

K.P. Ramakrishna Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The facts which are relevant to this Second Appeal are as follows: One Chikayi Ammal was the owner of a piece of immovable property. In 1919 she mortgaged it in favour of the deceased husband of the third defendant in the suit. Chikayi Ammal later sold this property, or the equity of redemption to one Chinnathayi, the deceased father of defendants 1 and 2. In 1920 Chinnathayi executed a second mortgage of the same property in favour of the plaintiff. It is convenient to refer to the third defendant as the 1st mortgagee, the plaintiff as the 2nd mortgagee and the first and second defendants as the mortgagor.

In 1926 the first mortgagee filed a mortgage suit upon the mortgage of 1919 and in that suit did not implead the second mortgagee as a party. In 1930 a mortgage decree was passed and in due course the mortgaged property was put up for sale by auction and was purchased at the sale by the first mortgagee, who, since that date has been in possession of the mortgaged property. There is no suggestion that the proceeds of the sale amounted to a sum which exceeded the amount due in respect of the first mortgage. In 1934 the present suit was filed, the

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plaintiff being the second mortgagee, impleading the first mortgagee as the third defendant.

In the trial Court the learned District Munsif decreed the suit in favour of the second mortgagee holding that the earlier decree had in no way affected his rights and that as the 12 year period of limitation in respect of the first mortgage had expired by the date of the institution of the second suit, the first mortgagee could not avail herself of its provisions and could not seek to have her mortgage redeemed by the 2nd mortgagee and was not entitled to remain in possession of the property against the decree which was passed in favour of the second mortgagee in the suit. The lower appellate Court reversed the decision of the learned District Munsif. It is against the reversal in the Court below that this appeal has been preferred.

O. 34, r. 1, Civil Procedure Code provides as follows:

"Subject to the provisions of this Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

As stated above the first mortgagee did not follow the provisions of the above rule and failed to join in the first mortgage suit the second mortgagee. Such a failure to join a subsequent mortgagee does not disturb the rights of the later mortgagee. The decree and the subsequent sale do not affect those rights which a subsequent mortgagee has under his mortgage. What are those rights? The second mortgagee is entitled to sue upon his mortgage and having obtained a decree and the mortgage debt remaining unpaid, the hypotheca can be sold and, subject to the rights of the prior mortgagee, the proceeds utilised to pay off the second mortgage debt. The first mortgagee has a prior right over the second mortgagee in regard to the satisfaction of her mortgage debt out of the mortgaged property. The failure to join the second mortgagee in the suit by the first mortgagee does not give to the former any further rights which he did not possess so as to entitle the second mortgagee to ignore the existence of the first mortgage.

In the present case the first mortgagee, having failed to join the second mortgagee in the suit and having obtained a decree and purchased the property in the subsequent auction sale and now being in possession, sets up her prior mortgage against the claims by the second mortgagee for possession and sale of the mortgaged property. On the other hand, the second

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mortgagee's contention is that since the period of limitation in respect of the first mortgage expired before the date when the second mortgage suit was filed, the first mortgagee cannot rely upon the first mortgage deed. It must be borne in mind that the first mortgagee is not suing upon or setting up this earlier mortgage by making any claim under it but is attempting to use it only as a shield to the claim put forward by the second mortgagee.

The learned Counsel for the appellant has conceded that if at the date of the institution of the present suit the period of limitation in respect of the earlier mortgage had not elapsed, then the first mortgagee could resist the claim by the second mortgagee by relying upon the provisions of the first mortgage. It is contended, however, that since the period of limitation had expired, the first mortgagee is not now entitled to rely upon her mortgage.

I have been referred to a number of authorities which appear to some extent to be conflicting. In *Kotappa* v. *Raghavayya*[1], a puisne mortgagee paid off a decree on a prior mortgage and was thereby subrogated to the prior mortgagee's rights thereunder. When the period of limitation under the earlier mortgage had expired, the mortgagor filed a suit for redemption of the puisne mortgage. The puisne mortgagee contended that he was entitled not only to the amount due to him under the second mortgage but also to the sum due under the prior mortgage which he personally had discharged and he attempted to resist redemption until both those debts had been fully satisfied. It was held that the rights under the prior mortgage could be enforced only within 12 years from the date on which a suit on that mortgage could have been brought. In this case, although the puisne mortgagee was a defendant and was resisting the claim for redemption, he was also endeavouring to enforce the prior mortgage in respect of which the statutory period of limitation had expired by claiming the monies due under the mortgage and was not merely using it as a defence to the claim for redemption but in addition was making the same claims as would be put forward if a mortgage suit had been filed upon the mortgage. The matter then under consideration was approached by the learned Judges, who decided that case, from the aspect of the right to enforce a

1. (1926) 52 M.L.J. 532: I.L.R. 50 Mad. 626.

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mortgage by suit. Madhavan Nair, J. in the course of his judgment at page 635 said:—

"A subsequent mortgagee has the right to pay off the prior mortgagee. By making such payment he acquires in respect of the property all the rights and powers of the mortgagee whom he has paid off. One of such rights is this power to enforce his charge against the property subject to the law of limitation. If, therefore, at the time when the subsequent mortgagee seeks to enforce the security by virtue of subrogation, a suit by the first mortgagee is barred by time, the subsequent mortgagee's right is also barred."

Again at page 638 the learned Judge having referred to *Mahomed Ibrahim Hussain Khan* v. *Ambika Pershad Singh*[1], held that the decision applied to the matter before him and said that,

"the first defendant's right to claim the additional amount, viewed as a claim to enforce the security, is consequently barred by limitation."

This decision was followed in *Draviam Chettiar* v. *Ramayya Chettiar*[2], by a Judge sitting alone and was approved in *Aravamudhu Aiyangar* v. *Zamindarini Srimathi Abhiramavalli Ayah*[3]. A decision to the same effect was given in *Sibanand Misra* v. *Jagamohan Lall*[4]. In all these cases the right of either the 1st mortgagee, or of any one who stands in his shoes, is dealt with from the aspect of the mortgage being enforced by way of a suit or by a proceeding comparable to the enforcement of a mortgage by a suit, such as resisting redemption until all the monies are paid under the mortgage. In *Mahomed Ibrahim Hussain Khan* v. *Ambika Pershad Singh*[1], a puisne mortgagee had advanced monies to pay off a prior mortgage and thereby he became subrogated to the prior mortgagee and he failed in the suit for a declaration that the properties were liable in respect of the earlier mortgage which was filed after the limitation period had elapsed. Again, that mortgagee was endeavouring to enforce the provisions of a mortgage deed and was not using it in any way as a defence.

In *Karuppa Chettiar* v. *Venkataperumal*[5], in the course of the judgment of Odgers, J, with which Phillips, J. agreed at page 467 he stated that if the decision in *Kotappa* v. *Raghavayya*[6], meant that a defendant could not set up his paid off mortgage except within 12 years from the date of the mortgage, the learned Judges did not agree with that decision which

1. (1912) 22 M.L.J 468: L.R. 39 I.A. 68: I L.R. 39 Cal. 527 (P.C.)
2. (1934) 68 M.L.J. 362.
3. (1933) 66 M L.J. 566.
4. (1922) I.L.R. 1 Pat. 780.
5. A.I.R. 1929 Mad. 465.
6. (1926) 52 M.L.J. 532: I.L.R. 50 Mad. 626.

apparently was based upon the decision in *Gopi Narain Khauna* v. *Bansidhari*[1], before the Judicial Committee, a case as to a plaintiff and not as to a defendant. It was held in *Karuppan Chettiar* v. *Venkataperumal*[2], that the purchaser in a court auction of a mortgage right is entitled to set it up as a shield against the puisne mortgagee who was not made a party to the suit on the mortgage and this right to set up the mortgage as a shield is not defeated by the 12 years rule of limitation. That decision was referred to with approval by Horwill, J. in *Halsnad Madappayya* v. *Mahabala Rao*[3], and a decision to a like effect is to be found in *Venkataramana Reddi* v. *Rangiah Chetty*[4]. In *Ram Sanehi Lal* v. *Janki Prasad*[5], (heard by five Judges) Sir Shah Sulaiman, Acting Chief Justice, in the course of his judgment at page 1045 said:

"The question of allowing a prior mortgagee, whose mortgage had long since become barred by time but who was in possession of the property under a decree obtained without impleading the subsequent mortgagee, to set up his prior mortgage as a shield, even though the limitation for the mortgage had run out, was prominently before their Lordships in *Sukhi* v. *Ghulam Safdar Khan*[6] and their Lordships allowed Ghulam Safdar to recover the amount due on his mortgage of 1883. This, to my mind, is a clear authority for the proposition that a prior mortgagee if he is in possession, can set up in defence a prior mortgage as a shield, although in his suit he had not impleaded the subsequent mortgagee and even though a fresh suit to enforce it would now be barred by time".

Three of the other learned Judges forming the Court agreed with the Judgment, from which I have just quoted. Whilst this passage may not have been in respect of a matter for decision in the case and is merely *obiter*, in *Sarda Prasad* v. *Kanhailal*[7], it was quoted with approval. Bennet, J. in the course of his judgment at page 413 said:

"This ruling of law is in our opinion, applicable to the present case. In the present case the appellant has been in possession, and although a suit on the original mortgages of 1909 and 1913 would now be time barred, the fact that the appellant is in possession entitles him to set up these mortgages as a shield".

In *Sukhi* v. *Ghulam Safdar Khan*[6] to which Sir Shah Sulaiman referred, Lord Dunedin in the course of their Lordships' judgment, at page 475 said that,

"An owner of a property who is in the rights of a first mortgagee and of

1. (1905) 15 M L.J. 191: L.R. 32 I.A. 123: I.L.R. 27 All. 325 (P.C.).
2. A.I.R. 1929 Mad. 465.
3. A.I.R. 1937 Mad 826.
4. (1921) 41 M.L.J. 399.
5. (1931) I.L.R. 53 All. 1023 (F.B.).
6. (1921) 42 M.L.J. 15: L.R. 48 I.A. 465: I.L.R. 43 All. 469 (P.C.).
7. A.I.R. 1933 All. 412.

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the original mortgagor as acquired at a sale under the first mortgage is entitled at the suit of a subsequent mortgagee, who is not bound by the sale or the decree on which it proceeded to set up the first mortgage as a shield."

In that case it would seem from the facts that the earlier mortgage might have been time barred at the time of the subsequent suit, but no argument or reference is made in regard to the question of limitation and it is not clear that it is an authority for the matter for decision before me. However, as pointed out earlier, a reference to the case before the Judicial Committee was made in *Ram Sanehi Lal* v. *Janki Prasad*[1] in which it was stated that a time barred mortgage deed could be utilised as a defence or shield.

The learned Counsel for the appellant has gone to the length of saying that if a first mortgagee in a mortgage suit failed to implead a second mortgagee, obtained a decree, had the property put up for sale, and it was purchased by an innocent stranger, then in a suit filed subsequently by the second mortgagee the innocent stranger could be ejected from the property, if at the date of the second suit the earlier mortgage had become statute barred. This is to my mind a far-reaching proposition. No authority was quoted in support of it.

In the line of authorities to which I have referred, of which *Kotappa* v. *Raghavayya*[2] is one, it is to be noticed, as I have pointed out, that claims were being made to enforce the mortgage. The other line of cases are authorities in which the first mortgagee, or the persons standing in his shoes, were not asserting or setting up any claim under the mortgage itself but using the provisions of the mortgage deed as a defence and to resist a claim or claims made by a subsequent mortgagee. In my view the latter line of decisions is to be preferred so far as the facts of the present case are concerned. The second mortgagee is not to be in any better position by reason of the failure to join him in the first mortgagee's suit than he was prior to that time, namely, he is entitled to have his rights which existed at the date of the institution of the first suit safeguarded.

Coming to the present appeal, the third defendant, as the first mortgagee, exercising her rights under her mortgage, obtained a decree and in the subsequent Court auction became

1. (1931) I.L.R. 53 All. 1023 at 1045 (F.B.).
2. (1926) 52 M.L.J. 532: I.L R. 50 Mad. 626.

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the purchaser and is in possession of the mortgaged property. This was effected within the period when the first mortgage could be enforced. The provisions of the first mortgage deed evidence the right under which the first mortgagee purchased and came into possession of the mortgaged property. Following *Karuppan Chettiar* v. *Vekataperumal*[1] and the authorities to a like effect, I am of opinion that the third defendant is entitled to resist the claim by the plaintiff under his puisne mortgage by relying upon and using the prior mortgage as a defence or a shield although by the date when the plaintiff's mortgage suit was filed the period of limitation of the earlier mortgage had expired and although the plaintiff, as second mortgagee, was not made a party to the third defendant's mortgage suit upon the prior mortgage.

Some of the authorities to which I have referred were considered by Wadsworth, J. in *Krishna Aiyar* v. *Subba Reddiar*[2]. In the light of the facts then before the learned Judge he preferred to adopt the other line of cases. If my decision to day is at variance with his opinion, then I must respectfully say that I do not agree with the conclusion at which he arrived.

The result is that the appeal is dismissed with costs.

Leave to appeal is granted.

K.C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—THE HON'BLE MR. JUSTICE PANDRANG ROW.

Gurusami Tevan .. *Appellant* (Prisoners) (Accused).*

Gurusami Tevan, *In re.*

Criminal Procedure Code (V of 1898), S. 162—Statement by accused to Police—Admissibility in evidence—Whether admissible as confession.

A complaint made by the accused to the Police is not inadmissible in evidence either because it is a statement made under S. 162, Criminal Procedure Code or because it is a confession made to a Police Officer.

Appeal against the Order of the Assistant Sessions Judge of the Court of Session of the Madura Division in Case No. 144 of the Calendar for 1937.

S. K. Ahmed Meeran for the Petitioner.

The Public Prosecutor for the Crown.

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1. A.I R. 1929 Mad 465.
2. (1939) 1 M.L J. 770.

*Cr. Appeal 28 of 1938. 5th August, 1938.

Gurusami Tevan, *In re.*

The Court delivered the following

JUDGMENT.—The appellant in this appeal has been convicted of attempt to murder and sentenced to undergo rigorous imprisonment for six years under S. 307, I. P. Code, by the Assistant Sessions Judge, Madura. The fact that it was the appellant who stabbed P. W. 3 during the night in question is established by the evidence of P. W. 3, which has been accepted by the learned Sessions Judge as well as by the assessors as being true. There is also the further fact that in a complaint made by the appellant himself at the Police Station he alleged that P. W. 3, was running away after setting fire to his house and that he pursued him that night in order to catch him, whereupon P. W. 3 beat him with a stout stick and he had to stab P. W. 3 in defence. I see no reason to doubt the veracity of of P. W. 3 in these circumstances. Some argument was addressed to me on the point that the complaint made by the appellant to the police must be deemed to be a statement made in the course of investigation and therefore must be deemed to be one under S. 162, Criminal Procedure Code. I am not impressed with the argument and I do not think the statement is inadmissible either because it is a statement made under S. 162, Criminal Procedure Code, or because it is a confession made to a Police Officer. Even apart from it and excluding the complaint from consideration, there is the evidence of P W. 3 which there is no reason to reject. The Court that heard his evidence including the assessors has found it to be reliable and there is nothing improbable in it.

The question however remains whether the offence disclosed by the evidence is one of attempt to murder and not merely one of causing grievous hurt with a dangerous weapon. Only one stab was given and there is nothing to show that the injury inflicted was likely in the ordinary course of nature to cause death. The medical evidence is only to the effect that if sepsis and gangrene had intervened, it would have endangered life, but this may be said of most injuries caused with sharp weapons. That cannot be regarded as a reason for coming to the conclusion that this was an attempt to murder. The assessors were unanimously of the opinion that the offence was only one of causing grevious hurt with a dangerous weapon, but the learned trial Judge appeared to have thought that their opinion on this

point could be ignored because they could not be expected to use his own words:—

"To discern the subtle distinction between an offence under S. 326, Indian Penal Code and an offence under S. 307, Indian Penal Code."

The distinction between these two offences whether it can be rightly regarded as subtle or not, was in this case perceived more clearly in my opinion by the assessors than by the learned trial Judge. I have no doubt that the assessors were right and that the trial Judge was wrong. The conviction is therefore modified into one under S. 326, Indian Penal Code. In the circumstances of the case the appellant is sentenced under S. 326, Indian Penal Code, to undergo rigorous imprisonment for two years.

B. V. V. *Conviction modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Shanmugha Nadar .. *Appellant** *(2nd Defendant)*

v.

Shanmughavel Nadar and another.. *Respondents (Plaintiff and 1st Defendant).*

Trade name—Passing off—Name acquiring secondary significance denoting plaintiff's goods—Defendant trading under same name—Infringement—Dissimilarity in get up—How far a protection—Form of injunction.

Plaintiff was a beedi manufacturer and the word "Shanmugham" had become so much associated with the beedies of the plaintiff's manufacture as to denote exclusively such beedies in the vicinity. The defendant recently began to manufacture beedies under the name of "P. S. Shanmugham and brother" and was selling such beedies describing them as "Seal Shanmugham beedies" and marking them with a colorable imitation of the plaintiff's seal. In a suit to restrain such use, it was found that defendant was using the name "Shanmugham" to deceive the public and the words "and brother" did not represent the truth. It was contended that the dissimilarity in the packing was sufficient to distinguish the defendant's beedies from plaintiff's.

Held, where a name has acquired a secondary signification as exclusively denoting the goods of a particular trader mere dissimilarity in get up is immaterial and affords no protection. An injunction must be issued, restraining the defendant's use of such name without taking reasonable precaution to distinguish his business or goods from that of the plaintiff.

Valentine Meat Juice Company v. *Valentine Extract Company, Ltd.* (1900) 83 L.T 259 and *Teofani & Co. Ltd.* v. *Teofani,* (1913) 2 Ch. D. 545, followed.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in A. S. No. 20 of 1935 preferred against

* S. A. No. 491 of 1936. 6th October, 1939.

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the decree of the Court of the District Munsif of Ambasamudram in O. S. No. 22 of 1933.

K. R. Rangaswami Aiyangar for Appellant.

K. Venkateswaran for Respondents.

The Court delivered the following

JUDGMENT.—The first respondent (hereinafter referred to as the respondent) is a prominent Beedi manufacturer and trader carrying on business under the name and style of K. A. Shanmughavel & Co., in Shandy Bazaar, at Ambasamudram for about fifteen years prior to the suit. He claims that his Beedies have acquired such a wide reputation in the market, particularly the two brands known as "Shanmughavel Beedi" and "Asal Shanmugham" or "Shanmugham Beedi", that the term "Shanmugham" and its adaptations have, as applied to Beedies manufactured or sold at Ambasamudram, become so much identified with his business and goods as to denote them exclusively among the purchasing public. Having learned that the appellant who bears the name of Shanmugha Nadar, taking advantage of his name, started business in beedies just a few months prior to the suit under the name and style of "P. S. Shanmugham and Brother" near the respondent's premises at the same place and was selling beedies describing them as "Seal Shanmugham beedies" and marking them with a colourable imitation of his own seal, he brought the suit out of which this second appeal arises against the appellant and his father (the second respondent) for an injunction restraining the defendants:

(*a*) from using the trade mark described in the plaint schedule or any colourable imitation thereof or the words 'Seal Shanmugham Beedi' 'Shanmugham seal beedi' or 'Seal Beedi' to designate or denote any beedies of their manufacture;

(*b*) from carrying on business under the firm name of 'P. S. Shanmugham and Brother' at all, or in any event without clearly and sufficiently distinguishing their goods from those of the respondent and without taking all precaution necessary in the trade and in the matter of wrappers and get up so as not to deceive and mislead purchasers; and

(*c*) from using the term "Shanmugham" in connection or association with beedies as a descriptive term thereof or as a trade name for their goods as distinguished and apart from any trader's name, under which they may be, if permitted, entitled to carry on business.

Though the real question for determination by the Court in all such passing off actions, however complex the scheme of deception may be, is always whether or not the goods of the defendant have been represented as and sold as if they were

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the goods of the plaintiff (See *Reddaway* v. *Banham*1) as many as seven issues were framed in the suit, dealing with what are but different aspects of the same question, and it is to be observed that the separate consideration of these issues and the recording of separate findings thereon, some of them apparently contradictory, have given rise to some contentions which might not have been otherwise possible. These findings which are concurrent may be summarised as follows; firstly, as regards the trade mark or seal, though the respondent had been using it from about 1920, he has not been very particular about using it since 1925 and its use was "more or less discontinued in or about that time"; secondly, the term "Shanmugham" has become so associated in the beedi trade at Ambasamudram and its vicinity with beedies manufactured by the respondent as to denote exclusively respondent's beedies; and the use of that term by the appellant either by itself or in conjunction with other words, as a description or designation of his goods would be calculated to deceive purchasers; thirdly the trade name of "P. S. Shanmugham and Brother" was a false name as no such partnership between the appellant and his brother was proved; fourthly so far as the get up of the goods is concerned, there was no such similarity in the labels or wrappers used by the parties as would lead to any mistake or confusion among purchasers; but by marking his goods with a colourable imitation of the respondent's seal and the words "Shanmugham seal beedi" the appellant intended to deceive purchasers. On these findings a decree was passed for the issue of an injunction restraining the appellant and his father (the second respondent herein):

> "from using the term 'Shanmugham' in connection or association with beedies as a descriptive term thereof or from using any trade name or trade mark in which the term 'Shanmugham' occurs or from carrying on business in the Ambasamudram Taluk in the firm name in which the word 'Shanmugham' occurs."

It is against this decree that this appeal has been preferred.

The appellant's learned Counsel Mr. Rangaswamy Iyengar in an interesting argument, contended before me that inasmuch as the appellant was merely using his own name for carrying on his business and describing his goods and it has been found by the courts below that the get up of the appellant's goods as they were placed in the market was so dissimilar that there

1. L.R. 1896 A.C. 199.

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was no likelihood of purchasers being deceived, no case for the issue of an injunction has been made out. Relying upon *Turton* v. *Turton*[1], he urged that so long as a man takes care to distinguish his goods sufficiently from those of another person when placing them in the market, so as to avoid any likelihood of mistake or deception on the part of the purchasing public, he could not be restrained by any injunction either from carrying on business in his own name or from using his name as a trade mark or as a descriptive term applied to his goods, even though such name has come to be so closely associated with that other person's goods as to denote them exclusively in the locality.

A number of cases have been cited on the one side or the other, but I do not propose to discuss all of them, as, in my view, the findings of the Courts below are plainly decisive of this appeal. There was also some debate at the Bar as to whether *Turton* v. *Turton*[1], on which Mr. Rangaswamy Iyengar so strongly relied in support of his arguments could still be regarded as good law, in view of the later decision of the House of Lords in *Reddaway* v. *Banham*[2], at any rate, in cases where a particular name or descriptive word as applied to certain goods has acquired what has been called a "secondary signification". I was referred to *John Brinsmeed and Sons Ltd.* v. *Edward George Stanley Brinsmeed*[3], where Buckley, L. J., observed that *Turton* v. *Turton*[1], was qualified by *Reddaway* v. *Banham*[2]. On the other hand, it was pointed out that there has been no decision of the House of Lords definitely throwing doubt upon the soundness of that decision and that in one of the latest cases dealing with this subject, *Joseph Rodgers and Sons, Ltd.* v. *W. N. Rodgers & Co.*[4], a case apparently of a name with a secondary signification, *Turton* v. *Turton*[1], was recognised and applied by Romer, J., as an authority still in force. I do not, however, think it necessary in this case to decide whether and how far the principle enunciated in *Turton* v. *Turton*[1], requires qualification in the light of the later decisions in England, as I am of opinion that even giving the fullest possible effect to that principle, it does not assist the appellant in this case. What happened there may be briefly stated. The plaintiffs had carried on business under the name of Thomas

1. (1889) 42 Ch. D. 128. 2. L.R. 1896 A.C. 199.
3. 30 Patent and Trade Mark Cases 493 at p. 510.
4. 41 R.P.C. 277.

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Turton and sons and the name of the firm acquired reputation and prestige in the Iron and Steel Trade in the locality. The defendant, John Turton, also set up a business in the same place and of the same kind in partnership with his sons under the trade name of 'John Turton and Sons' and the action was brought for an injunction restraining the defendants from carrying on their business under this name, John Turton and Sons. It will be noticed that there was no question of the defendants having used any trade mark of the plaintiff in connection with the goods but it was simply a question of the name under which the defendants were carrying on their business. The learned Judges held that so long as a man carried on business in his own name simply or in a name which, as a description of that business, represents nothing but the accurate and exact truth, he did no wrong and could not be restrained by an injunction from doing so merely because the business of some other person better known in the trade under the same name was prejudicially affected. Lord Esher observed at page 134:—

"He had not done anything with the intent or for the purpose of making the use of his simple name look as if his name were the name of the plaintiffs. In some cases, besides using the name, parties have, to use what I think is a happy phrase of my brother Cotton's, garnished that use—that is, they have done things besides using the name in order that the use of that name might look as if it were being used by the old firm. There is nothing of that kind here. The defendants have carried on a business a great part of which is the same as the plaintiffs, but they have carried it on in the name of John Turton and Sons, the name of the principal being John Turton, and it being true that he has taken his sons as partners—he has done nothing but that."

After discussing the judgment of Lord Justice Turner in *Burgess* v. *Burgess*[1], the learned Judge points out that the fundamental principle in such cases is that no man can have the right to represent his goods as the goods of another person, and where a man merely uses his own name, there is no *prima facie* case that he is selling his goods as the goods of another person.

"But if besides using his own name, he does other things which show that he is intending to represent, and is, in point of fact, making his goods represent, the goods of another person, then he is to be prohibited but not otherwise." (at. p. 137.)

It will be apparent from these quotations that the principle of the decision in *Turton* v. *Turton*[2], is this: No man has any

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1. (1853) 3 De G. M. and G. 896 at 904 : 43 E.R. 351.
2. (1889) 42 Ch. D. 128.

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right to represent that his business is the business of another person, but when a man carries on business in his own name which happens to be also the name of another, he does not make any such representation, but represents only what is the 'accurate and exact truth', namely, that it is his own business.

Even the decision of Romer, J., in *Joseph Rodgers and Sons Ltd.* v. *W. N. Rodgers & Co.*[1], on which Mr. Rangaswami Iyengar relied as showing that *Turton* v. *Turton*[2]. must still be regarded as an authority in full force, shows that the principle of that decision cannot be invoked by a person who uses his name in combination with other words as a trade name which, taken as a whole does not represent the bare truth, and whose conduct otherwise also shows that he deliberately intends to pass off his goods as those of another. Romer, J., stated the law thus:—

"It is the law of this land that no man is entitled to carry on his business in such a way as to represent that it is the business of another; or is in any way connected with the business of another; that is the first proposition. The second proposition is, that no man is entitled so to describe or mark his goods as to represent that the goods are the goods of another. To the first proposition, there is, I myself think, an exception; a man, in my opinion, is entitled to carry on his business in his own name so long as he does not do anything more than that to cause confusion with the business of another, and so long as he does it honestly. It is an exception to the rule which has of necessity been established .... The exception to the first rule is, however an exception made in the interests of honest trading; again it is an exception which only authorises the use by a man of his own name; it is not an exception which, even in an honest case, entitles a man to use something that is not his own name; that is to say, it does not entitle him to use his name in combination with something else, such as the words 'and company' .... To the second rule, to which I have referred, I think there is no exception at all, that is, a man is not entitled so to describe his goods as to lead to the belief that they are the goods of somebody else. It is not necessary that there should be an exception to that."

Now what are the facts found in the present case? From the summary given above, it will be seen that the appellant has been trading under a name which does not represent the truth; for, no such partnership as 'P.S. Shanmugam and Brother' was proved and further, that the appellant has, by marking his goods with a seal which is a colourable imitation of the seal which the respondent was using, and by using the name 'Shanmugham' which has acquired a secondary signification as exclusively denoting the respondent's beedies in the designation of the

1. 41 R.P.C. 277. 2. (1889) 42 Ch. D. 128.

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appellant's goods as 'Shanmugham seal beedies', he wants to deceive the public. These findings, to my mind, completely exclude the application of *Turton* v. *Turton*[1], and *Joseph Rodgers & Sons Ltd.* v. *W. N. Rodgers, & Co.*,[2] to the facts of the present case.

Mr. Rangaswami Iyengar laid great stress on the findings that the respondent had discontinued the use of his seal from about 1925 and the get up of the appellant's goods was so dissimilar that they would not be mistaken for the goods of the respondent, and urged that the appellant could not therefore be said to have intended to deceive the public. As I have already indicated, this argument has been made possible by the manner in which the Courts below have dealt with the different aspects of the case separately recording distinct findings thereon as if they were different subjects for decision. The lower Courts have however, taken care to make it clear that their findings as to the get up of the appellant's goods not being calculated to deceive the public should be understood only as a finding on that issue alone viewed apart from the other issues arising in the case. The learned District Munsif observes in paragraph 10:—

"Taking however my findings on the other issues and the facts on which such findings are based, I would hold that though there is a strong dissimilarity, there is a likelihood of purchasers being deceived."

The learned Subordinate Judge's finding on this point is also similarly qualified while his conclusion that the appellant's conduct, taken as a whole, betrayed an intention to deceive the public is clear and emphatic. I do not therefore see any force in this contention. Moreover, it has been held by the Court of Appeal in England that where a name has acquired a secondary signification as exclusively denoting the goods of a particular trader, mere dissimilarity in get up is immaterial and affords no protection. In *Valentine Meat Juice Company* v. *Valentine Extract Company Ltd.*,[3] dealing with an argument based on the dissimilarity of the get up of the defendants' goods, Lord Alverstone M. R. observed at page 269:—

"It is said that the boxes containing the preparation are entirely different when you come to look at them I do not at all deny it. I am not dealing with this case upon any consideration of make up of the goods put side by side. I do not suggest that any body would think of necessity that

1. (1889) 42 Ch. D. 128. 2. 41 R.P.C. 277.
3. (1900) 83 L.T. 259.

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the stuff in the bottle was the same as the stuff in the boxes But knowing as we do that it is a common method of giving medicines now to put them into globules a person would be extremely likely to think that a Valentine's Meat Globule or that a Globule made by the Valentine Extract Company contained the same meat extract as Valentine's Meat Juice . . . . I do not think that a person in the present day could properly use the words "Valentine's Extract" in connection with meat juice without passing off his goods as the goods of the plaintiff."

Similarly Lord Justice Collins said at page 271:—

"The get up has nothing whatever to do with this case. It may be dismissed altogether from the discussion, because the representation is not as to the form in which the article is sold. It is not suggested that the defendants pass off bottles which are not distinguishable from the plaintiffs'. The representation is as to the thing contained in the integument. In the plaintiffs' case the integument is a bottle. and in the defendants' it is a globule in a tin But the representation is that which is contained in the globule—namely, the extract of meat—is made by the plaintiffs. That is what the representation is, and therefore the form and get up have, I repeat, nothing whatever to do with the case, and may be dismissed."

That was, of course, a case where the name "Valentine", which happened also to be the name of one of the defendants, was found to have acquired a secondary signification, so as to denote the plaintiffs' meat extract exclusively and the defendant was enjoined from using that name though it was also his own name in connection with his goods *however different or dissimilar the get up of the latter might be.* Similarly here, it having been found that the word 'Shanmugham' has become so much associated with the beedies of the respondent's manufacture as to denote exclusively such beedies in Ambasamudram and its vicinity, the appellant cannot sell his goods under a description containing the word 'Shanmugham' without passing off his goods as those of the respondent, however different or dissimilar the wrappers and the get up of his goods may be. The case being therefore clearly one for the issue of an injunction the question next arises as to the form in which the injunction is to issue. It seems to me that the injunction ordered by the Courts below restraining the appellant, as it does, absolutely from using his own name in describing his business or designating his goods goes too far. It has been recognised in several cases that it is a strong thing to restrain a defendant from using his name in whatever manner in connection with the business carried on by him or the goods manufactured by him, and even in cases where such name was found to have acquired a technical or a secondary signification in the market so as to denote the plaintiff's goods exclusively, Courts have so

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framed the injunction as to allow the defendant to use his name so as not to mislead the public into believing that his goods are the goods of the plaintiff. In *J. and J. Cash Ltd.* v. *Cash*[1], the Court restrained the defendant from carrying on his business either in the name of 'Cash' or under any other name in which the name 'Cash' occurred, without taking reasonable precautions to clearly distinguish the business carried on by them from the business of the plaintiffs and from selling frillings or woven names or initials not manufactured by the plaintiffs as 'Cash's Frillings' or 'Cash's woven names' or initials. In the *Valentine Meat Juice Co's case*[2], already referred to, the injunction so far as it related to the defendant, Richard Valentine, restrained him from carrying on business as manufacturer or vendor of any preparation or extract of meat or meat juice under any name or title of which the name 'Valentine' or 'Valentine's' formed part without clearly distinguishing such business from the business of the plaintiffs and from selling any such preparation under any such name or description without clearly distinguishing such preparation from the goods of the plaintiffs. Similarly in *Teofani & Co., Ltd.* v. *Teofani*,[3] also a case where the word 'Teofani' was found to have acquired a scondary signification, Warrington, J., granted an injunction restraining the defendant from selling or offering for sale cigarettes as 'A. Teofani's cigarettes' or otherwise marking his goods with the name 'Teofani' either with or without other names, without clearly distinguishing such cigarettes from the cigarettes of Teofani & Co., Ltd., (Plaintiffs) and this injunction was confirmed by the Court of Appeal.

In view of these decisions, I am of opinion that the injunction ordered by the Courts below should be qualified in the manner indicated in these decisions, that is to say, by the addition, at the end, of the words : "Without taking reasonable precaution to clearly distinguish the business carried on or beedies manufactured or sold by the defendants from the business carried on and the beedies manufactured by the plaintiff."

Subject to this modification, the decree of the Court below is confirmed and the appeal is dismissed. In the circumstances each party will bear his own costs of this appeal.

Leave refused.

K.S. *Appeal dismissed.*

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1. 18 R P.C. 213.
2. (1900) 83 L.T. 259
3. (1913) 2 Ch. 545.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE LAKSHMANA RAO.

Nandivada Ganganna Dhora .. *Prisoner** (*3rd Accused*).

Ganganna Dhora, *In re.*

Evidence Act (I of 1872), Ss. 26 and 27—Charge of murder—Confession of third accused followed by unsuccessful search by him for a spear said to have been hidden by him—Subsequent production of the spear by first accused—Admissibility of statement of third accused under S. 27, Evidence Act.

Three accused were charged with murder. The third accused made a statement to the police and in the search which followed he was unable to find the spear. The first accused afterwards took out and produced the spear.

Held, the discovery of the spear was not in the essential sense of the word due to the information given by the third accused and when the informant has tried unsuccessfully to recover such property the effect of his information has become completely exhausted. The statement does not fall within S. 27 but within S. 26 and is inadmissible in evidence.

Trial referred by the Court of Session of the Vizagapatam Division for confirmation of the sentence of death passed upon the said prisoner in Case No. 52 of the Calendar for 1939 on 15th December, 1939 and Appeal by the prisoner against the said sentence of death and the sentence of three years rigorous imprisonment passed upon him in the said case.

P. Basi Reddi for Prisoner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The judgment of the Court was delivered by

King, J.

King, J.—The appellant was the third accused in S. C. No. 52 of 1939 before the learned Sessions Judge of Vizagapatam. The three accused in that case were charged with the murder of one Pendyala Ramalingam, Village Munsif of Kondasekharapalli and with the murder of Pantala Appayya, a bandy driver and with causing hurt with a dangerous weapon to two of the witnesses in the case, P. Ws. 14 and 15. The evidence in the case established the fact that the deceased Ramalingam and the two witnesses started in Appayya's bandy from Kondasekharapalli on the night of the 20th June, last to go to Parvatipur and that they were attacked by three men about half way on their journey. Ramalingam was killed immediately but Appayya survived until the 22nd when he died in hospital and the two witnesses received minor injuries. The

*Referred Trial No. 7 of 1940 and Criminal Appeal No. 12 of 1940. 27th February, 1940.

evidence in the case was twofold; firstly, the evidence of identification and secondly, evidence based upon the confession made by the appellant. The evidence of identification was not considered by the learned Sessions Judge sufficiently safe to act upon. He accepted neither the evidence of the two witnesses who were travelling in the bandy nor that of the two other witnesses who say that they saw the three accused near the scene of offence shortly before the offence must have been committed, and in consequence acquitted the first and second accused.

The accused were arrested on the 24th June, and the appellant made a long statement which was recorded as Ex. Y. At the conclusion of that statement the appellant promised the police to take them to the place where the first accused had buried the spear with which he had stabbed the occupants of the bandy. The next day, the 25th June, the third accused accordingly took the police to a *gedda* and, after he had himself unsuccessfully searched for the spear, the first accused took it out and produced it. The evidence upon which the third accused has been convicted by the learned Sessions Judge consists almost entirely of this statement. The statement has been admitted in full as one made under S. 27 of the Indian Evidence Act. It seems however to us very doubtful whether this is a statement admissible under S. 27 at all. No doubt, in one sense of the word, if the evidence is believed—and we see no reason why it should not be—it was the information given by the appellant which actually led to the fact that the police officer came to this particular *gedda*. But if the events of that morning be more closely analysed, it will be seen that the discovery of the spear was not in the essential sense of the word due to the information given by the third accused but was due simply and solely to the action of the first accused who, according to the prosecution case, had himself hidden the spear in that particular spot. No doubt it is not necessary that the informant himself should personally recover any property about which he gives information. But when the informant has tried unsuccessfully to recover such property it must, we think, be conceded that the effect of his information has become completely exhausted. No doubt if one of the police officers themselves or any third party acting on the information of the third accused had recovered this spear, S. 27 would have been applicable. But, as it is, we

Ganganna Dhora, *In re.* King, J.

are of opinion that this spear was recovered not because of any information given by the appellant, though that may have been the proximate cause of the presence of the party at the *gedda*, but by the action of the first accused himself. We would accordingly hold that Ex. Y does not fall within S. 27 but within S. 26 and is inadmissible in evidence. That being so, there is no evidence upon which the appellant could possibly be convicted. This appeal must be allowed and the conviction set aside and he will be set unconditionally at liberty.

K. S. *Appeal allowed and conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR JUSTICE LAKSHMANA RAO.

Natesa Padayachi and others .. *Accused.**

Natesa Padayachi, *In re.*

Criminal Procedure Code (V of 1898), S. 182—Complainant cheated and parting with money at Trichinopoly—Jurisdiction.

Where the complainant was cheated and parted with money at Trichinopoly the case can be tried by the Sub-Divisional Magistrate of Trichinopoly

Case taken up in Revision by the High Court calling on the accused in C. C. No. 117 of 1939 on the file of the Court of the Sub-Divisional Magistrate of Trichinopoly to show cause why the order of the Sub-Divisional Magistrate of Trichinopoly dated 23rd October, 1939, in the said C. C. No. 117 of 1939 should not be set aside.

The complaint was as follows:—A1 informed the complainant living in a village near Udayarpalayam that certain gold coins found in a treasure trove were available for sale from A2 at Trichinopoly. A1 took the complainant to Trichinopoly and introduced the complainant to A2. A2 told the complainant that the coins were in his father-in-law's possession in Rajapalayam and asked complainant and A1 to go over to Trichinopoly a week later. A1 took complainant to Trichinopoly to A2's house and A5 was there who was said to be a messenger from A3 who had brought some coins A2 asked A5 to show the complainant a sample and A5 gave a gold coin. Complainant asked for more but A2 asked the complainant to go to his village, test the coin and then come. The complainant found the coin to be of genuine gold and a week later went with A1 to Trichy to A2's house. A5 was also there. A2 said that more coins were with A3 at Rajapalayam and directed A1 and A5 to take complainant to Rajapalayam immediately to

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*Crl R. C No. 998 of 1939. (Taken up No. 10 of 1939). 21st February, 1940.

show all coins and bring him back to Trichy for fixing the price: Complainant, A1 and A5 went to Rajapalayam, met A3 and A4 who showed a heap of coins and returned to Trichy to fix the price with four sample coins. The price was fixed at Rs. 3500 immediate payment of which was demanded. Complainant with A1 returned to his village and came with the money to Trichy. The money was taken by A2 and handed over to A5. But when the coins were demanded, A5 said they were at Rajapalayam and being a treasure trove could not be brought over for fear of detection. A2 directed A1 and A5 to take complainant to Rajapalayam and deliver the coins. At Rajapalayam a bag said to contain 2000 gold coins was delivered to complainant. After taking them to his village, complainant found that there were only 1385 coins of brass.

Natesa Padayachi, *In re.*

The five accused were charged before the Sub-Divisional Magistrate, Trichinopoly for having cheated the complainant and objection was taken as to jurisdiction.

Accused not represented.

The Public Prossecutor (V. L. Ethiraj) for Crown.

The Court made the following

ORDER:—The complainant was cheated and parted with the money at Trichinopoly and the case can be tried by the Sub-Divisional Magistrate of Trichinopoly—*vide* S. 182 of the Code of Criminal Procedure. The records will therefore be returned and the Sub-Divisional Magistrate will proceed with the case in accordance with law.

K. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

The Crown Prosecutor .. *Appellant**

v.

T. Sellamuthu .. *Respondent (Accused).*

Crown Prosecutor *v.* Sellamuthu.

Penal Code (XLV of 1860), S. 206—Offence under—Judgment-debtor—Undertaking given to Court not to transfer property—Transfer made in breach of undertaking—Intention to deceive creditor—Ingredient as to secrecy—Registration of document whether negatives.

Where the accused, who was the judgment-debtor, gave an undertaking to the executing Court not to alienate certain property pending the disposal of a claim petition but immediately thereafter he executed a registered deed of conveyance transferring the said property to his own son and he was thereupon prosecuted for an offence under S. 206, Indian Penal Code.

Held, that the object of the transfer by the accused in breach of his undertaking was to deceive his creditor, that the ingredient of secrecy was not

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* Criminal Appeal No. 270 of 1938. 1st December, 1938.

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negatived by reason of the registration of the deed of transfer, and that the accused was liable to be convicted for an offence under S. 206, Penal Code.

The word "fraudulently" in the Penal Code ordinarily connotes firstly an element of secrecy and secondly an intention to cause injury.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) on 9th April, 1938, by the Third Presidency Magistrate of the Court of Presidency Magistrates, Egmore, Madras in C. C. No. 168 of 1938 on his file.

K. V. Ramaseshan for Appellant.

K. Sanjiva Kamath for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal against an acquittal on a charge under S. 206 of the Indian Penal Code. The accused was the first defendant in a small cause suit, his son being the second defendant. A decree was passed for Rs. 231 in favour of the plaintiff P. W. 4, here against the accused, the suit being dismissed as against the son. In execution of the decree a cow belonging to the accused was attached. A claim petition was filed by the wife of the accused. The claim was allowed on 14th May, 1936, on the undertaking given by the accused that he would not for three months thereafter alienate a piece of land owned by him. On the 25th May, 1936, the accused executed a registered sale deed in respect of the property covered by this undertaking in favour of his son, the exonerated defendant. After various proceedings this Court filed a complaint under S. 476 (1) of the Code of Criminal Procedure, charging the accused with an offence under S. 206, of the Indian Penal Code. The defence to the criminal complaint was, firstly, a denial of the undertaking, secondly a plea that the motive was to satisfy the pressure of his son for the discharge of debts, and thirdly, various legal contentions with which I shall deal separately.

There can be no doubt as to the fact of the undertaking which is embodied in Court record exhibited. It seems to me most unlikely that the motive of the accused was to satisfy the pressure of his son based on alleged old debts which according to the recitals in the sale deed are made up of a series of small hand loans mostly made months prior to the date of the sale. The undertaking having been given only a few days before the sale, it is incredible that the fact of the undertaking would not

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have been present prominently in the mind of the accused when he carried out the sale. The son denies that he knew about this undertaking. At any rate he was a party to the litigation and as such he must have known about the decree. On these facts, I find it impossible to agree with the conclusion of the Magistrate that the transfer was not fraudulent. The Magistrate supports his conclusion not by any clear finding of fact that the transfer has not been proved to be fraudulent but by certain legal contentions.

It is no doubt correct that the word 'fraudulently' in the Penal Code ordinarily connotes firstly, an element of deceit or secrecy and secondly an intention to cause injury. In my opinion there can be no doubt about the latter element in this case. The accused having so recently given this undertaking must have known that the transfer in breach of the undertaking would have the effect of impeding the execution of the decree and he must have intended that it would have that effect. It is to my mind quite immaterial whether it would be possible for the decree-holder by taking other proceedings to defeat that attempt. If there was an intention to prevent this property being taken in execution of the decree and if that intention had as its motive the object of injuring the creditor, it does not matter whether the object was likely to be achieved or not. There remains the question whether there was the ingredient of deceit or secrecy in the act of the accused. It is argued that there could have been no secrecy because there was prompt registration. I do not agree with this contention as a statement of law. Although registration in theory implies publicity, in fact, it can be and frequently is carried out in such a way that the person adversely affected knows nothing about it. The proper way to regard this case is to look at the fact of the transfer along with the immediately preceding fact of the undertaking given to the Court and taking these two facts together with the other known circumstances to deduce therefrom the intention of the transferor. He knew that his creditor had been lulled into a sense of security by the undertaking given in Court. With this knowledge he almost immediately carried out the transfer in favour of his own son, one who was not likely to publish the fact of the transfer in such a way that it would go to the ears of the creditor. To my mind it is patent that the object of the transferor must have been to

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deceive his creditor and to injure him by preventing the attachment of this property in execution. His object was to deceive because firstly, he promised the creditor in open Court that he would not alienate and then almost immediately afterwards, he transferred to a member of his own family. His object was to injure and to prevent execution against this property because he knew that his son having been exonerated in the suit would be in a position to claim the property as his own. To my mind it does not matter whether or not the creditor might by taking troublesome proceedings in the Civil Courts circumvent this plot.

I am therefore of opinion that the case falls clearly under S. 206 of the Indian Penal Code and that the acquittal of the accused is wrong. I convict him of the offence with which he is charged and sentence him to a fine of Rs. 25 or in default to two weeks' rigorous imprisonment.

B. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Puzhakkarat Kozhuvammal Ammad and another .. *Appellants** (*Plaintiffs*)

v.

Cheriath Manayil Paru Amma .. *Respondent* (*1st Defendant*).

Kozhuvammal Ammad *v.* Paru Amma.

Second appeal—Costs—Trial Court's discretion—Appellate Court's right to interfere how far justifiable.

On the question of costs the trial Court has a discretion which could be only interfered with in an appeal, if it is found the trial Court has exercised the discretion improperly.

Where it turns out that the lower appellate Court did not consider the question of costs from the right angle, the High Court can interfere in second appeal and remand the matter for fresh disposal

Appeal against the decree of the District Court of North Malabar in A. S. No, 73 of 1936 preferred against the decree of the Court of the District Munsif of Payyoli in O.S. No. 195 of 1930.

K. Kuttikrishna Menon for Appellants.

K. P. Ramakrishna Aiyar for Respondent.

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*S.A. No. 1150 of 1936. 12th December, 1939.

Kozhuvammal Ammad *v.* Paru Amma.

The Court delivered the following

JUDGMENT:—A suit was brought for redemption and was decreed, the mortgagee being ordered, for special reasons stated by the trial Court, to personally pay the costs of the plaintiff. On this question of costs an appeal was preferred to the District Court; and the District Judge came to the conclusion after considering the facts of the case that the defendant should not have been called upon to personally pay the costs.

It is contended that no Second Appeal lies against an order for costs and certain authorities have been quoted; but there can be no doubt that if in the Courts below wrong principles have been applied or there is some error of law in awarding the costs, then this Court can interfere in Second Appeal. If in the present case, for example, I can be satisfied that the lower appellate Court had considered the matter from the right point of view and had found after consideration of the facts that the first Court had wrongly exercised its discretion, then it would not be open to me to interfere with the lower Court's finding. It is argued that the lower appellate Court misunderstood the facts upon which its decision was based; but even if it did not, it does not seem that the lower appellate Court considered the question of costs from the right angle. The trial Court has a discretion in the matter of costs and that discretion should only be interfered with in appeal if the trial Court has exercised its discretion improperly. It nowhere appears in the judgment of the lower appellate Court that the District Judge asked himself whether the trial Court had properly exercised its discretion. He clearly considered the matter of costs as if he had been trying the suit himself. That was not the proper way of approaching the question.

The appeal is therefore allowed and the first appeal remanded to the District Court of North Malabar for fresh disposal. The appellate Court will have full liberty to re-consider the facts bearing on this question. The costs of this appeal will abide the result.

The Court Fee paid in this Court to be refunded.

K.C. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice.* MR. JUSTICE KING AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

Pavayi and others .. *Appellants* (Plaintiffs and 2nd Plaintiff's L.Rs.)*

v.

Palanivela Goundan and others .. *Respondents (Defendants 17, 18, 20, 21, 22 & 1 to 16).*

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Limitation Act (IX of 1908), Ss. 19 and 20—Mortgage—Purchase of equity of redemption in execution—Loss of personal remedy against mortgagor—Payment after that by mortgagor—Whether payment within S. 20 or acknowledgment within S. 19 to save limitation.

After the equity of redemption had been assigned and after the mortgagees had lost their personal remedy against the mortgagor, the mortgagor made a small payment. In a suit on the mortgage,

Held, the payment cannot save the suit from the bar of limitation.

Appeal against the decree of the Court of the Subordinate Judge of Salem in A. S. No. 5 of 1935 preferred against the decree of the Court of the District Munsif of Sankaridrug at Salem in O. S. No. 33 of 1933.

S. S. Ramachandra Aiyar for Appellants.

M. Krishna Bharathi for Respondents.

2nd November, 1939.—The Court (Horwill, J.) made the following Order of Reference to a Full Bench:

The first defendant and his father executed a mortgage in favour of the plaintiff's assignors. The equity of redemption was brought to sale in execution of a simple money decree and was purchased by the assignor of defendants 17 to 20 After the equity of redemption had been assigned and after the plaintiffs had lost their personal remedy against the first defendant's father, the latter made a small payment towards interest If this payment is a payment within the meaning of S. 20 of the Limitation Act or an acknowledgment within the meaning of S. 19, this suit is in time; otherwise the suit is barred by limitation. The lower appellate Court found that S. 20 of the Limitation Act did not save the suit from the bar of limitation.

S. 20 says that a fresh period of limitation shall be computed from the time of payment,

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*S. A. No. 665 of 1936. 6th March, 1940.

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"where interest on a debt is before the expiration of the prescribed period, paid as such by the person liable to pay the debt .....".

This payment was not made within the prescribed period and it was made by a person who had ceased to be under any legal liability to pay the debt. S. 20 does not use the word 'legal'. but it is difficult to see in what way the word 'liable' can be used except as legally liable. It would therefore seem from the natural interpretation of S. 20 that that section has no application. It is argued that if S. 20 does not apply, then S. 19 would and that this payment can be considered to be an acknowledgment. S. 19 says,

"Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed .... a fresh period of limitation shall be computed from the time when the acknowledgment was so signed."

In the first place, any act or statement of a person who is not prejudiced by a statement that a debt still exists cannot be said to be an acknowledgment in the ordinary sense of that word. An acknowledgment is an admission against one's own Interest that a certain fact or state of affairs is true. Moreover, S. 19 further requires that the acknowledgment should be by the party against whom such property or right is claimed. Clearly after the transfer of the property, no property or right could be claimed against him.

The Lord Chancellor in *Bolding* v. *Lane*[1], in dealing with an almost similar case, refers to such a contention as being monstrously unjust and says:

"If it (the decision) be well founded, then, according to the true intent and meaning of this statute, the right of one man may be taken away by the act of another..... The mortgagor or his representative who may have no interest whatever in the lands ..... shall be enabled to charge the estate anew with any amount of arrears of interest as against the second and subsequent mortgagees".

Obviously the interpretation sought to be put upon Ss. 19 and 20 in this Court would open the door to a great deal of fraud. A person who has no interest in the property would naturally not be at all reluctant to state that the debt still existed, and a mortgagee desirous of obtaining some such statement which would bind the person really interested in the property would have no difficulty in obtaining. An anti-dated statement would make the mortgagee to avoid the bar of limitation.

In all the cases of this Court and other High Courts where any opinion on this question has been expressed at all, with the exception of Ramesam, J's judgment in *Narayana* v. *Venkataramana*[2]

1. (1863) 1 De G. J. & S. 122: 46 E.R. 47.
2. A.I.R. 1935 M. 899.

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learned judges have seen the danger of accepting a statement by a person no longer interested against a party interested. Sadasiva Ayyar, J. in *Lakshmana Chetti* v. *Muthaya Chetti*[1] observes that an acknowledgment is binding,

"provided the mortgagor had a substantial interest in the mortgage contract."

Pandalai, J. in a Bench decision *Muthu Chettiar* v. *Muthusami Iyengar*[2] says that he thinks that the mortgagor must be at least personally liable or a portion of the property should remain unsold for an acknowledgment to be binding. In all these cases which have been quoted the mortgagor had retained some interest. Cases in which a mortgagor without any interest at all has made an acknowledgment must necessarily be very small; for a mortgagee would be unlikely to seek an acknowledgment from a person who had lost his interest except for some fraudulent person. The remarks of the District Munsif even in this case suggests a fraudulent collusion between the mortgagee and the mortgagor to the detriment of the assignee of the equity of redemption.

Ramesam, J. expressing the opinion of the Bench in *Narayana* v. *Venkataramana*[3] a case very similar to the one before me, takes an opposite view. Some distinction is sought to be drawn between the case considered by Ramesam and Stone, JJ. and the present case. Here the transferee of the equity of redemption obtained title in court-auction and the original mortgagor was under no liability to give him a good title, whereas in *Narayana* v. *Venkataramana*[3], the sale was a private one; and it is argued that as the vendor was interested in seeing that the vendee had a good title, he still retained an interest in the property and that the acknowledgment was not therefore by a person who had no interest at all. Ramesam, J. however does not make this distinction and his judgment presupposes that in that case the mortgagor had no interest whatever. He does not however think that any injustice is done to the vendee by an acknowledgment by the vendor and he says:-

"We do not see any injustice in so holding in this country where we have got a Law of Registration and every purchaser or incumbrancer can easily know of the existence of any prior mortgage........The subsequent purchaser or incumbrancer who knows the existence of a mortgage ought also to know the possibility of the mortgage being kept alive by acknowledgment or payment and as he purchased only the equity of redemption it cannot be said that he is disappointed. He gets what he bargained for. He has no right to expect that the mortgage would become barred and he can make a profit in the transaction."

1. (1919) 40 M.L.J. 126.
2. (1932) 63 M.L.J. 111: I.L.R. 55 Mad. 758.
3. A.I.R. 1935 Mad. 899.

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There is therefore a conflict of opinion on the question whether a mortgagor who has no longer an interest in the mortgaged property can by a payment or an acknowledgment save limitation againt the person having an interest in the equity of of redemption.

Let the papers be sent to the Registrar to be placed before my Lord, the Chief Justice for posting this appeal before a Bench.

(This case coming on for hearing in pursuance of the aforesaid Order, the Court delivered the following) :—

Leach, C.J.

JUDGMENT.—*The Chief Justice*:—This appeal raises a question of limitation and one of some difficulty. The appellants filed a suit in the Court of the District Munsif of Salem to enforce a mortgage which had been created on the 12th November, 1913 by a Hindu father and his son. The appellants are the assignees of an interest in the mortgage. Under the terms of the mortgage deed the debt became payable in one year. On the 16th January, 1919 a creditor of the mortgagors obtained a money decree against them and in execution of that decree purchased the equity of redemption. On the 16th December, 1920, the first mortgagor paid to the mortgagees Rs. 200, towards the amount of interest then due in respect of the mortgage debt. A record of this payment was endorsed on the deed and signed by the first mortgagor. A suit to enforce the mortgage was filed on the 9th December, 1932. The question which arises is whether the payment of the Rs. 200, on the 16th December, 1920, saves the suit from being barred by the law of limitation. That the personal remedy against the mortgagors is barred is conceded but it is said that inasmuch as the payment of the Rs. 200 towards interest was made within eight years of the creation of the mortgage a fresh period of limitation started and the suit having been filed within twelve years from the date of the payment of interest the appellants are entitled to have the property sold in order to realise what is due to them. The District Munsif held that the payment of interest on the 16th of December, 1920, did operate to save limitation and granted the appellants a decree. On appeal the Subordinate Judge of Salem held that the suit was out of time.

The Subordinate Judge's decision was based on his interpretation of S. 20 of the Limitation Act which says that where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt

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or legacy, or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made. By the Indian Limitation (Amendment) Act, 1927, a proviso was inserted to the effect that after the 1st January, 1928 acknowledgment of the payment must be in the handwriting of, or in a writing signed by, the person making the payment. As I have indicated there was such an acknowledgment in writing by the first mortgagor, but as this was not necessary at the time the Rs. 200 was paid the mere payment would have been sufficient if the section applied. In this Court it has been contended on behalf of the appellants that both Ss. 19 and 20 can be called in aid to save limitation. S. 19 states that where before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability has been made in writing signed by the party against whom the property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was signed.

For the respondent it has been argued that inasmuch as the mortgagors had parted with all their interest in the properties as the result of the Court auction on the 16th January 1919, they were not personally liable to pay the mortgage debt, and therefore did not come within S. 20 of the Limitation Act. On the same basis it was contended that they were not in a position to give an acknowledgment of liability within the meaning of S. 19. There are several decisions of this Court bearing on the question, which has also been raised before the Calcutta High Court. I will state the effect of these decisions and then discuss the principle involved in the light of certain English decisions which in my opinion also have bearing.

The decisions of this Court are those given in *Velayudham Pillai* v. *Vaidhilingam Pillai*[1], *Yagnanarayana* v. *Venkata Krishna Rao*[2], *Muthu Chettiar* v. *Muthuswamy Iyengar*[3], and *Narayana* v. *Venkataramana*[4]. In *Velayudham Pillai* v. *Vaidhilingam Pillai*[1], a person executed a deed of gift of the whole of his property. After the gift had been made he paid interest in respect of the amount due on a promissory note signed by him before the date

1. (1912) 24 M.L.J. 66.
2. A.I.R. 1925 Mad. 1108.
3. (1932) 63 M.L.J. 111 : I.L.R. 55 Mad. 758.
4. A.I.R. 1935 Mad. 899.

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of the gift. Benson and Sundara Ayyar, JJ. held that by reason of the provisions of S. 20 of the Limitation Act the payment was sufficient to keep alive the debt against the universal donee. In *Yagnanarayana* v. *Venkata Krishna Rao*[1], Coutts-Trotter, C.J, and Ramesam, J. considered that a person who was a party to a mortgage contract could make an acknowledgment even after his interest in the properties had ceased, but they added that the acknowledgment bound only him or persons claiming through, him *i.e.*, assignees from him after the acknowledgment. They accepted the opinion expressed by Mookerjee, J. in *Surjiram Marwari* v. *Barhamdeo Prasad*[2], to which I shall presently refer. In *Muthu Chettiar* v. *Muthuswamy Iyengar*[3], Jackson, J. held that an acknowledgment of mortgage debt made by a mortgagor after he had lost his interest in the mortgaged property affected both him and his alienee, but Krishnan Pandalai, J. who formed the Bench with Jackson, J. did not go to this length. In his view an acknowledgment of the mortgage debt made by a mortgagor who had sold a portion of the mortgaged property, but remained personally, or in respect of the unsold portion, liable on the mortgage was effective to save limitation as against the property sold. In *Narayana* v. *Venkataramana*[4], Ramesam and Stone, JJ., held that by reason of S. 19 of the Limitation Act an acknowledgment by the mortgagor subsequent to the sale of the mortgaged property saved limitation and made the purchaser of the equity of redemption liable on the mortgage. In that case the mortgagee undertook to deliver a quantity of paddy in payment of principal and interest and the deliveries of paddy were endorsed on the deed. The deliveries of paddy were made on the 3rd January, 1904, 14th January, 1911, and 12th January, 1914, in payment of interest. The mortgagor sold the equity of redemption on the 5th January, 1908. The mortgagee filed a suit on the mortgage within twelve years from the 12th January, 1914. The purchaser of the equity of redemption contended that the suit was barred as the mortgagor could not bind his successors, but this contention was not accepted. In that case the defendant relied on the following *dictum* of Lord Westbury in *Bolding* v. *Lane*[5], where the Lord

1. A.I.R. 1925 Mad. 1108.
2. (1905) 1 C.L.J. 337.
3. (1932) 63 M.L.J. 111: I L.R. 55 Mad. 758.
4. A.I.R. 1935 Mad. 899.
5. (1863) 1 De. G. J. & S. 122: 46 E.R. 47.

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Chancellor said:

"It was not the intention nor is it the effect of the section to give to the mortgagor or other person, who is 'by law compellable to pay the interest,' a statutory power to deprive, by his acknowledgment given to a prior encumbrancer, the subsequent encumbrancers, the benefit of the statute, which would be monstrously unjust, but to enact a plain and simple rule that no person having a charge on lands shall recover more than six years' interest on such charge against any other person having an interest in the lands without an acknowledgment in writing, signed by such person or by some former owner from whom the interest is derived."

Ramesam and Stone, JJ., rejected this argument on the ground that they did not see any injustice in making a purchaser or subsequent encumbrancer liable in such circumstances in view of the fact that in India there was a law of registration and every purchaser or encumbrancer can easily know of the existence of a prior mortgage.

I will now turn to the Calcutta decisions. In *Krishna Chandra Saha* v. *Bhairab Chandra Saha*[1], a Bench of that Court (Maclean, C. J., and Mitra, J.), held that S. 19 of the Indian Limitation Act applied in these circumstances. *A* mortgaged several properties under a deed dated 28th April, 1887. He then sold one of them to *B* who mortgaged it to *C* and in a mortgage suit by *C* the property was sold and purchased by *D*. After the sale had taken place *A* paid part of the principal as well as interest under the mortgage to *B* and made an acknowledgment of his liability under it. The question was whether the acknowledgment kept the mortgage debt alive against the property bought by *D*. It was held that it did. Maclean, C. J., expressed a similar opinion sitting with Holmwood, J., in *Domi Lal Sahu* v. *Roshan Dobay*[2]. But these decisions of the Calcutta High Court are not in accord with that of Mookerjee, J., in *Surjiram Marwari* v. *Barhamdeo Prasad*[3], on which reliance was placed in *Yagnanarayana* v. *Venkata Krishna Rao*[4]. Mookerjee, J., there said:

"It is argued on behalf of the respondents that the second mortgagee derives his title or liability from the mortgagor, and, that, consequently, an acknowledgment by the mortgagor in favour of the first mortgagee, is operative against the second mortgagee, no matter whether such acknowledgment was given before or after the second mortgagee derived his title. After careful consideration of this argument, I am unable to accept it as well-founded. I think that the proper construction to be put upon the section (S. 19 of the Limitation Act) is that when it makes an acknowledgment given

1. (1905) I.L.R. 32 Cal. 1077. 2. (1906) I.L.R. 33 Cal. 1278.
3. (1905) 1 C.L.J. 337. 4. A.I.R. 1925 Mad. 1108.

by one person operative as against another on the ground that the latter derives title or liability from the former, it contemplates that the derivation of title or liability (which is the essential condition for the extended operation of the acknowledgment) takes place after the acknowledgment has been given."

In certain of the cases to which I have referred the mortgagor retained an interest in part of the mortgaged properties sold, but I do not consider that this makes any difference in principle. The question is whether a mortgagor who has lost all interest in the mortgaged property, can by an acknowledgment within the meaning of S. 19 or by the payment of interest or principal within the meaning of S. 20, bind the person on whom his interest has devolved. If he cannot bind the purchaser of the equity of redemption when the purchase covers the whole of the mortgaged properties obviously he cannot bind the purchaser of part of the mortgaged properties.

As I have shown, Coutts-Trotter, C. J., and Ramesam, J., in *Yagnanarayana* v. *Venkata Krishna Rao*[1], accepted the opinion of Mookerjee, J., in *Surjiram Marwari* v. *Barhamdeo Prasad*[2], that in order to be binding on the assignee the acknowledgment must be made before the person making it has parted with his interest in the property, and I see no reason to doubt the correctness of this opinion. And if a mortgagor, who has lost all interest in the mortgaged property cannot bind the purchaser of the equity of redemption by an acknowledgment he cannot bind his assignee by a part payment of interest or principal. A payment of interest to start a fresh period of limitation must be made by the person liable to pay the debt or by his agent duly authorised in that behalf. If the personal remedy against the mortgagor is barred he is no longer liable to pay the debt. If the mortgagee's remedy against the property is not barred the mortgagor or his representative in interest can avoid the sale by payment of the mortgage debt, but that does not make him liable to pay. He may pay if he chooses. If he does not choose the mortgagee is left to his remedy against the property.

I do not share the opinion that the English authorities are not in point. There is no fundamental difference between the provisions of Ss. 19 and 20 of the Indian Limitation Act and the corresponding provisions of the English Act. S. 40 of the

1. A.I.R. 1925 Mad. 1108. 1. (1905) 1 C.L.J. 337.

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Act for the Limitation of Actions and Suits relating to Real Property (3 and 4 Will. IV Ch. 27) was in these terms:—

"That after the said 31st December, 1833, no action or suit or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment or the last of such payments or acknowledgments, if more than one, was given".

S. 40 of the Act of 1833 has been replaced by S. 8 of the Real Property Limitation Act, 1874 (37 and 38 Vic. Ch. 57), but the only difference between the two sections is that a period of limitation of twelve years has been substituted for one of twenty years. It seems to me that Ss. 19 and 20 of the Indian Limitation Act embody all the elements of this section.

I have already quoted the observations of Lord Westbury in *Bolding* v. *Lane*[1], and no English authority has been quoted to us which throws doubt on the opinion there expressed. In fact, the Court of Appeal applied the same principle in *Newbould* v. *Smith*[2]. In that case a solicitor lent money to a client on equitable mortgage, and on the 12th February, 1866, an account was settled between them as to the amount due. In July, 1878, the client assigned the mortgaged property to his two nephews, and the question was whether an entry dated 10th September, 1878, in a diary kept by the solicitor, who had since died was admissible in evidence. That entry showed the receipt of money paid by the mortgagor by way of interest. North, J., held that this entry was not admissible in evidence. On appeal it was held that assuming the entry to be admissible evidence, as to which the Court gave no opinion, it proved nothing but a payment on account of interest by a person who when he made it had no interest in the mortgaged property, and was not shown to be the agent of the assignee. Therefore, the payment of interest did not start a new period of limitation. Cotton, L.J., said:

" In my opinion even if in fact C. E. Smith" (the client) "in September,

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1. (1863) 1 De. G. J. and S. 122: 46 E.R. 47.
2. (1886) 33 Ch. D. 127.

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1878, paid a sum in respect of interest on this mortgage, that would not be sufficient to prevent the statute running in favour of those to whom previously to this time he had transferred the property. It is said that he had assigned it subject to the mortgages and charges thereon. That is so, but that does not make him an agent to pay interest on behalf of those to whom he has transferred the property. It may be he might have a claim against them, but that is not the question which we are considering. The question is whether this payment is to be considered as their payment, that is to say, whether he is to be considered as their agent in making it. They say in their statement of defence that if this payment was made it was not made by their authority or with their knowledge. In my opinion, then, even if the entry is admissible, it does not prove anything that can help the plaintiff".

Lindley and Lopes, LL.J., delivered judgments to the same effect. I can see no reason why the principle propounded in *Bolding* v. *Lane*[1], and *Newbould* v. *Smith*[2], should not be applied in India. The principle is one which accords in full with the spirit of the equity and unless the Indian Statute of Limitation is so worded as to preclude its application—and I have said sufficient to indicate my opinion that it does not—it must be applied. It follows that in my judgment the decisions of this Court which have not applied this principle should no longer be regarded as good law.

I hold that the case has been rightly decided by the Subordinate Judge and that the appeal should be dismissed with costs.

King, J.

King, J.:—I agree.

Krishnaswami Ayyangar, J.

Krishnaswamy Ayyangar, J.:—I agree.

K. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Manikyam Kondayya and others .. *Appellants**

Kondayya, *In re.*

Indian Penal Code (XLV of 1860), Ss. 149 and 326—Grievous hurt by accused—Other accused joining in unlawful assembly with the common object of causing hurt—Punishable for grievous hurt—Criminal Tribes Act (VI of 1924), S, 23 (1).

S. 23 (1) of the Criminal Tribes Act seems to relate to the time of conviction and not to the time of the occurrence which is the subject of a trial that ends in the conviction.

Where the first accused was charged under S. 326 of Indian Penal Code for causing grievous hurt and the others under S. 149, of the same Code for forming themselves into an unlawful assembly with the common object of causing hurt to a person,

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1. (1863) 1 De. G. J. and S. 122: 46 E.R. 47.
2. (1886) 33 Ch. D. 127.

*Crl. App. No. 336 of 1938. 26th January, 1940.

Held, that if, in the prosecution of the common object, one of them causes grievous hurt and that too with a dangerous weapon. the others would certainly be liable for grievous hurt so caused; else it would make the provisions of S. 149 entirely otiose.

Appeal against the judgment of the Court of the East Godavari Division at Rajahmundry in C. C. No. 17 of 1938 passed on 20th July 1938.

B. Jagannadha Das for Appellants.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court delivered the following

JUDGMENT.—The appellants have been convicted after a trial with the aid of assessors by the Sessions Judge of East Godavari on various charges and sentenced to undergo various terms of imprisonment which are to run concurrently.

The charge against them was that they formed themselves into an unlawful assembly with the common object of causing hurt to the village munsif of Anur, to which place the appellants belong, and in prosecution of that common object, one of the accused, namely, the first accused, caused grievous hurt to the village munsif with a knife. The other accused were charged under the same section, namely, S. 326, Indian Penal Code, under the provisions of S. 149, Indian Penal Code. There was also a further charge against the first accused under S. 23 (1) of the Criminal Tribes Act. There is some doubt as to whether this charge was justified or not, as he was not a member of the criminal tribe at the time of his conviction though he was a member at the time of the occurrence. The section seems to relate to the time of conviction and not to the time of the occurrence which is the subject of the case which ends in his conviction. The conviction of the first accused under S. 23 (1) of the Criminal Tribes Act will be set aside and the sentence thereunder also and he is acquitted of that offence. But this will not make any material difference because there are convictions of the first accused under Ss. 148 and 326, Indian Penal Code and sentences of the same description under those sections as the sentence under S. 23 (1) of the Criminal Tribes Act. I shall therefore go on with the merits of the appeal.

As observed by the Sessions Judge, the evidence against the accused is straightforward and simple. The village munsif is P. W. 2. He has been the village munsif for a period of 25 years and the accused have been living in that village for about

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16 years. There can be no doubt therefore that the accused are all well-known to him and there can be no question of mistaken identity arising in the case. The evidence also establishes the fact that there has been ill-feeling borne by the appellants against the village munsif for some years past, the ill-feeling having arisen out of nothing else than the discharge by the village munsif of his duties as a village munsif. Apparently the zeal displayed by the village munsif against the appellants, who are members of a criminal tribe, goaded them to take revenge on him and they took the opportunity when the village munsif was returning home after inspecting his fields. On the 16th of February, 1938, they waylaid him when he was alone, and felled him down with stick blows and when he had fallen down accused 2 and 3 made him sit up while the first accused deliberately cut the village munsif's upper lip with a pen knife, and in the course of this operation, the lower part of the nose was also cut. The village Munsif became unconscious and he was later on taken to his house and finally to the hospital where he had to remain as an in-patient till the 10th March. There is no doubt that as a result of the injury inflicted on him with a knife, the village munsif's face has become permanently disfigured, and even otherwise the hurt caused to him was undoubtedly grievous hurt and it was caused with a sharp instrument. The offence therefore under S. 326 is established beyond doubt so far as accused 1, 2, and 3 are concerned because there is no doubt that accused 2 and 3 at the time were jointly participating in the act by which the injury was inflicted by the first accused. Besides the village munsif who speaks to the attack on himself and the participation of all the appellants therein, there is the evidence of his nephew, P. W. 3, who saw the occurrence and went to the rescue of his uncle and ran away only after he was himself injured, and also the evidence of P. W. 4, who went to the rescue of the village munsif. P. W. 3 implicates all the appellants. P. W. 4 no doubt says that he did not see the fifth accused but saw the other four accused. His not seeing the fifth accused does not mean that the fifth accused was not there. The positive evidence about the fifth accused's presence is of P. Ws. 2 and 3 and it is sufficient to show that the omission of P. W. 4 to see the fifth accused is due to one of those unaccountable aberrations which occur when one is taken by surprise by a sudden or unexpected occurrence and is not able to take in anything that is feasible to him. In any case, the participation of all the accused in the

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attack on the village munsif is, in my opinion, established beyond all doubt.

There is also some other evidence of persons who saw the appellants running away from the scene of occurrence. I have no doubt that the case is one in which the evidence has clearly established the participation of all the accused in the joint attack on the village munsif and the offences charged under Ss. 147 and 148 are established beyond doubt.

It has been argued with some vehemence so far as accused 4 and 5 are concerned, that they could not be held responsible for an offence under S. 326, Indian Penal Code, by the operation of S. 149, Indian Penal Code, because the common object is stated in the charge to have been to beat the village munsif whereas grievous hurt is said to have been caused to him with a knife. I presume that what was meant was that the common intention was to cause hurt and the word 'beating' was used in this sense in a somewhat careless manner in the charge. There can be no doubt that the accused knew perfectly what they had been charged with, namely, that their common object was not merely to beat but also to cause hurt; and if in prosecution of that common object to cause hurt to the village munsif, one of them happens to cause grievous hurt and that too with a dangerous weapon, the others would certainly be liable for the grievous hurt so caused, else it would make the provisions of S. 149 entirely otiose. I am therefore of opinion that the convictions of accused 4 and 5 also of an offence punishable under S. 326 Indian Penal Code, by reason of S. 149, Indian Penal Code, are right. The sentences are really not excessive in view of the circumstances of the case. The learned Judge observes that the crime was cruelly conceived and ruthlessly carried out and that the object of the appellants in cutting away the upper portion of the lip and a part of the nose was not merely to disfigure the village munsif but also to dishonour him. He also gives other reasons for imposing what he calls a deterrent sentence. The sentences do not certainly err on the side of severity and do not require any interference in appeal. The appeal is therefore dismissed under S. 423, Criminal Procedure Code.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

Vajjula alias Hanumanthavajjula Suryanarayanamurthy .. *Appellant** (*Plaintiff.*)

v.

Hanumanthavajjula Gopalakrishnamma and another .. *Respondents* (*Defendants 1 & 2.*)

Vajjula *v.* Gopalakrishnamma

Hindu Law—Adoption—Refusal of consent by nearest sapinda—Absence of any other sapindas of husband—Effect—Improper refusal of consent—Burden of proof.

A widow cannot adopt a son to her husband unless she has received authority from him or has received the consent of her husband's sapindas. If the nearest sapindas improperly refuse their consent to an adoption the widow is entitled to seek the consent of the next nearest sapindas. But there is no residuary power in a widow to adopt when her husband's sapindas are all dead. The burden is on the widow to prove that consent was improperly withheld.

Case-law reviewed.

Appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in O. S. No. 29 of 1935.

K. Kameswara Rao for Appellant.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice:—The respondents have not appeared to oppose this appeal but as the Court has decided to allow it the reasons must be stated. The suit out of which the appeal arises was filed by the appellant in the Court of the Subordinate Judge of Rajahmundry for a declaration that the adoption of the first respondent by the second respondent was invalid. The second respondent is the widow of one Jagappa, alias Jagannatha Sastrulu, who died on the 11th December, 1868. The adoption took place on the 4th July, 1929, nearly 61 years after the death of the husband of the second respondent. The second respondent was a very young girl when her husband died and was still under the guardianship of her father. There were two defences set up. It was said that the appellant and other sapindas had given their consent to the adoption and that

*Appeal No. 266 of 1937. 26th February. 1940.

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Leach, C.J.

the widow was given power to adopt by a will executed by her deceased husband. The Subordinate Judge held that the appellant was the only living sapinda, that he had not given his consent, and that the alleged will was a forgery, but he dismissed the suit on the ground that the appellant had refused his consent from an improper motive.

That the consent had been refused was common ground, but the appellant was not asked why he had refused his consent and there is nothing in the evidence which indicates that he refused his consent improperly. The Subordinate Judge assumed that the appellant had refused his consent on the ground that his rights as a reversioner would come to an end if the widow adopted a son to her husband and considered that this would be an improper motive. The Subordinate Judge was not entitled to make this assumption. The burden was on the respondents to prove improper motive—see *Kristnayya* v. *Lakshmipathi*[1],—and as the burden had not deen discharged the appellant was entitled to succeed.

Under the Mitakshara law as interpreted in this Province the widow cannot adopt a son to her husband unless she has received authority from him or has received the consent of her husband's sapindas. That the consent of the sapindas is necessary in the absence of direct authority from the husband is to be gathered from the decisions of the Privy Council in *The Collector of Madura* v. *Mootoo Ramalinga Sethupathy*[2], *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*[3], *Veerabasavaraju* v. *Balasurya Prasada Rao*[4], *Kristnayya* v. *Lakshmipathi*[1], *Sri Krishnayya Rao* v. *Surya Rao Bahadur Garu*[5], and *Balasubramanya Pandya Thalaivar* v. *Subbayya Thevar*[6]. A Full Bench decision of this Court of which my learned brother and I were members had to consider the effect of these authorities in the recent case of *Gundavarapu Seshamma* v. *Kornepati Venkata Narasimha Rao*[7], and it was there held that they had decided that in the absence of authority from her

1. (1920) 39 M.L.J. 70: L.R. 47 I.A. 99: I.L.R. 43 Mad. 650 (P.C.).
2. (1868) 12 M.I.A. 397.
3. (1876) I.L.R. 1 Mad. 174: L.R. 4 I.A. 1 (P.C.).
4. (1918) 36 M.L.J. 40: L.R. 45 I.A. 265: I.L.R. 41 Mad. 998 (P.C.).
5. (1935) 69 M.L.J. 388 (P.C.).
6. (1938) 1 M.L.J. 426: L.R 65 I.A. 93: I.L.R. 1938 Mad. 551 (P.C.).
7. (1940) 1 M.L.J. 400 (F.B.).

husband the widow could adopt only with the consent of the nearest agnates, unless consent was improperly withheld, in which case she might lawfully adopt with the consent of the next nearest agnates. If there were no agnates she must look for advice to the cognates, it having been definitely laid down by the Privy Council that she was not competent to decide on an adoption for herself.

In delivering the judgment of the Judicial Committee in *Balasubramanya Pandya Thalaivar* v. *Subbayya Thevar*[1], Sir George Lowndes observed that it would be difficult for their Lordships to hold that under the Madras law there would be any residuary power in the widow to adopt in the absence of sapindas, but as it was not necessary to give a definite pronouncement on the question the discussion stopped there. In my opinion, the effect of the cases which have been decided by the Judicial Comittee on appeals from this Court is that a widow has no power to adopt unless she has express authority from her husband or in the absence of such authority she is acting under the advice of her husband's sapindas.

In *Patnaloo Appalaswamy* v. *E. Moosalaya*[2], a Bench of the Rangoon High Court held that a widow has the same powers to adopt as her husband had in his lifetime when there are no sapindas living, but the learned Judges did not examine the line of cases starting with *The Collector of Madura* v. *Mootoo Ramalinga Sethupathy*[3]. One of the learned Judges, (Das, J.) based this opinion on a passage in the judgment of the Privy Council in *Sri Bulusu Gurulingaswami* v. *Sri Bulusu Ramalakshmamma*[4], where their Lordships said that in Madras.

> "it is established......that unless there is some express prohibition by the husband, the wife's power, at least with the concurrence of sapindas in cases when that is required, is co-extensive with that of the husband."

In that case the Judicial Committee was merely concerned with the question whether a widow could make an adoption of the only son of a kinsman and was not considering the question now under discussion. The other learned Judge (Dunkley, J.) relied on the judgment of the Privy Council in *Kristnayya* v.

1. (1938) 1 M L.J. 426: L.R. 65 I A. 93: I.L.R. 1938 Mad. 551 (P.C.).
2. (1933) 12 Rang. 22.
3. (1868) 12 M.I.A. 397.
4. (1898) 9 M L.J. 67: L.R. 26 I A. 113: I.L.R 22 Mad. 398 (P.C.).

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Lakshmipathi[1], but I am unable to read it in the same way as he did. The question which the Privy Council was considering there was whether there could be a lawful adoption when the consent of some of the nearest sapindas had not been sought or obtained. Their Lordships held that the absence of consent on the part of the nearest sapindas could not be made good by the authorisation of distant relatives. If the nearest sapindas improperly refuse their consent to an adoption the widow is, however, entitled to seek the consent of the next nearest sapindas. In my judgment the decisions of the Privy Council when fully examined entirely negative the proposition that there is residuary power in a widow to adopt when her husband's sapindas are all dead.

If follows that in my opinon the second respondent had no power to adopt the first respondent and that the decision of the Subordinate Judge is erroneous. I would allow the appeal and decree the appellant's suit with costs both here and below.

Krishnaswami Aiyangar, J.

Krishnaswami Ayyangar J.:—I agree.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Palanisami Goundar .. *Appellant* (2nd Defendant)*

v.

Kaliappa Goundar .. *Respondent (Plaintiff).*

Palanisami Goundar v. Kaliappa Goundar.

Civil Procedure Code (V of 1908), S. 95—Application for compensation for wrongful attachment—If setting aside order of attachment essential before such application—If averment and proof of special damages necessary for granting of compensation.

Setting aside an order of attachment is not an essential preliminary to the grant of compensation under S. 95, Civil Procedure Code. Decision in *Rama Mudali* v. *Marappa Goundan,* (1934) 67 M.L.J. 448 is based on *Lees* v. *Patterson,* (1878) 7 Ch.D. 866 and rules of common law. No such preliminary step is prescribed in S 95 which alone governs the procedure in a summary application for compensation for wrongful attachment. To succeed in a claim by application under S. 95, Civil Procedure Code, special damages need not be averred or proved. On the merits no case was made out for the award of any compensation.

Appeals against the orders of the Court of the Subordinate Judge of Coimbatore dated 5th June, 1936 and made in I. A.

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1. (1920) 39 M.L.J. 70: L.R. 47 I.A. 99: I.L.R. 43 Mad. 650 (P.C.).

* A.A.O. Nos. 404 and 405 of 1936. 14th August, 1939.

Nos. 850 and 1064 of 1935 respectively in O. S. No. 230 of 1935.

S. T. Srinivasagopalachari for Appellant.

N. Somasundaram for Respondent.

The Court delivered the following

JUDGMENT.—C.M.A. No. 404 is an appeal against an order making absolute an attachment before judgment. C.M.A. No. 405 is an appeal against the dismissal of an application under S. 95 of the Civil Procedure Code for compensation for wrongful attachment. The trial Court heard together both the application to vacate the *ad interim* attachment and the application for compensation. In such circumstances it seems hardly fair to apply as against the appellant the rule embodied in *Rama Mudali* v. *Marappa Goundan*[1] according to which an application for compensation for wrongful attachment would not lie until the attachment itself has been set aside. The trial Court had before it an application to set aside the attachment and abstained from passing orders on it until the hearing of the application for compensation was finished. Similarly in this Court I have before me both an appeal against the order confirming the attachment and an appeal against the dismissal of the application for compensation. Incidentally I may observe with reference to the case just quoted that there is another decision of this Court reported in *Palaniandi Moopan* v. *Pachi Palaniandi Moopan*[2] which takes the contrary view and holds that the passing of an absolute order of attachment is no bar to an application under S. 95 and with all respect to the learned Judge who decided the former case, it does seem to me that the requirements of an application under S. 95 should be based on the language of the section and not on rules obtaining in Common Law with reference to a similar but not identical Common Law remedy. The decision in *Rama Mudali* v. *Marappa Goundan*[1] is based on *Lees* v. *Patterson*[3] which was a case in which damages for the wrongful issue of a writ of *ne exeat* were refused on the ground that the writ had not been set aside. But it seems to me that no such preliminary step has been prescribed in S. 95 which alone governs the procedure in a summary application for compensation for wrongful attachment. I doubt whether one would

1. (1934) 67 M.L.J. 448. 2. 1931 M.W.N. 956.
3. (1878) 7 Ch. D. 866.

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be justified in hedging this remedy round with restrictions which the section itself does not import. In any case, as I have already indicated, when the cancellation of the attachment has been prayed for and orders thereon have been withheld pending an adjudication on the application for compensation, it seems to me unfair to non-suit the applicant under S. 95 for want of a final order on the connected application. I assume therefore that the setting aside of the order of attachment is not an essential preliminary to the grant of compensation.

A further question arises whether it is necessary to prove what is commonly known as special damage in order to justify such an order. S. 95 itself uses the words "reasonable compensation to the defendant for the expense or injury caused to him", and it is argued that the addition of the word "injury" to the word "expense" is an indication that the Code contemplates not only what is usually called special damage but also what is usually called general damage. There appears to be some confusion imported into this question by the language of the Bench which decided *Manjappa Chettiar* v. *Ganapathi Gounden*[1] where the learned Judges, while holding that it is not necessary in an action for damages for wrongful attachment to prove pecuniary loss or specific damage to reputation, do seem to treat the general injury caused by unspecific loss of reputation as if it fell within the definition of special damage. I take it that special damage as distinct from general damage means the particular damage which results from the particular circumstances of the case; or when special damage is the gist of the action, it denotes the actual and temporal loss which has in fact occurred. Thus it would not cover compensation for mental anxiety or for general loss of repute but it would cover the medical expense resulting from an actual injury or the loss of a particular contract owing to damage to reputation The prevailing view in Madras at any rate appears to be that in a suit for damages for illegal attachment it is not necessary to prove more than general damage, *e.g.*, mental pain, general loss of reputation etc. For this, authority is found in *Nicholas* v. *Sivarama Ayyar*[2] which is later than the apparently conflicting judgments in *Manjappa Chettiar* v. *Ganapathi Gounden*[1] and *Rama Aiyar* v. *Govinda Pillai*[3]. The

1. (1911) 21 M.L.J. 1052: I.L.R. 35 Mad. 598.
2. (1922) I.L.R. 45 Mad. 527.
3. (1915) 30 M.L.J. 180: I.L.R. 39 Mad. 952.

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Calcutta High Court seems to have taken a different view. I have not been referred to any Madras case regarding the nature of damage to be proved in an application for compensation for wrongful attachment under S. 95, Civil Procedure Code. There are decisions *Subraya Davay* v. *Venkatarama Aiyar*[1] and *Arumugam Pillai* v. *Kadir Mohideen Rowther*[2] to the effect that there is no necessity to prove special damage when the application is one for compensation for wrongful arrest. That, of course, is not quite the same thing as an application for damages for wrongful attachment, for it has always been held that a wrongful arrest from its very nature causes damage and it would therefore be unnecessary on general principles to require proof of particular damage when once it is established that the liberty of the person had been restrained. In a Calcutta case *Chandulal Siraogi* v. *Purna Chandra Paul*[3] it was held that mere allegations of general damage to prestige and general humiliation were not sufficient to support an application under S. 95 in the case of an attachment. But one must approach this decision with some caution in view of the difference of attitude taken by this High Court towards suit for damages for malicious attachment from that taken by the Calcutta High Court. If once it is granted that special damage need not be proved in a suit for damages for wrongful attachment, I see nothing in the language of S. 95 to justify the inference that special damage need be proved in application under S. 95 for a similar relief. The remedy being statutory one is entitled to look to the words of the section itself in order to ascertain whether it is necessary to prove special or particular damage flowing from the attachment. It seems to me that the words "expense or injury" indicate that either the particular damage upon which a monetary value can obviously be placed or the more general damage which the court endeavours with difficulty to assess in terms of money, is contemplated by the section.

Having decided, therefore, that the present application is not bad for want of a previous cancellation of the order of attachment and that it need not fail for want of any averment of special damage, it remains to consider whether the claim of the appellant is entitled to succeed on the merits.

1. (1915) 3 L.W. 30. 2. (1926) 24 L.W. 252.
3. (1935) 39 C.W.N. 915.

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[His Lordship then summarises and discusses the facts.]

On the facts established I am of opinion that the appellant failed to make out the case which it was necessary for him to establish and that the plaintiff (respondent) did succeed in establishing that his application was not made on insufficient grounds. It is true that the affidavit supporting the application was disfigured by inaccuracies and by a vagueness resulting from combining together the financial condition of two separate defendants. At the same time I am not convinced that the respondent had no grounds for making the application and I therefore dismiss both the appeals with costs in C.M.A. No. 405 of 1936.

K.S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUNHI RAMAN.

V.E.R.M.K. Krishnan Chettiar by agent Rama Ayyangar .. *Petitioner** (*Respondent*)

v.

P.L.P. Devarayan Chettiar .. *Respondent* (*Nil*).

Krishnan Chettiar v. Devarayan Chettiar.

Provincial Insolvency Act (V of 1920), S. 54—Mortgage by debtor within three months of adjudication—Alienation under threat of legal proceedings and to escape liability for costs—If fraudulent preference.

In an application by the Official Receiver to annul a mortgage created by a debtor within three months of the adjudication in favour of a simple money creditor,

Held, if the dominant motive was not to prefer and if the alienation was made under threat of legal proceedings by the creditor which would saddle the debtor with costs the said alienation could not be impeached in law as a fraudulent preference.

Case-law discussed

Petition under S. 75, Cl. 1 of Act V of 1920, praying the High Court to revise the decree of the District Court of Coimbatore in C.M.A. No. 162 of 1936 preferred against the order of the Court of the Additional Subordinate Judge of Coimbatore dated 6th August, 1936 and made in I.A. No. 1526 of 1935 in I.P. No. 249 of 1931.

T. V. Ramiah for Petitioner.

T. K. Sundararaman for Respondent.

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* C.R.P. No. 526 of 1937. 30th August, 1939.

Krishnan Chettiar v. Devarayan Chettiar.

The Court delivered the following

JUDGMENT.—This is a petition to revise the order of the learned District Judge of Coimbatore allowing an appeal in the following circumstances. The Official Receiver of Coimbatore applied before the learned Subordinate Judge of Coimbatore under Ss. 53 and 54 of the Provincial Insolvency Act to annul, on the ground of fraudulent preference a mortgage deed executed by a person whose estate was, after his death, adjudicated insolvent. The mortgage deed was executed on the 7th July, 1931 in favour of the petitioner here who was the respondent in the Court of the Subordinate Judge. The petition to have the mortgagor adjudicated insolvent was presented on the 9th September, 1931. Subsequently the mortgagor died, and after his death, adjudication took place after his sons were brought on record to represent his estate. The learned Subordinate Judge held on the evidence before him that no case of fraudulent preference was made out and that the mortgage was executed as a result of pressure which the mortgagee who was a *bona fide* creditor of the insolvent brought to bear on him. To the mortgage the minor sons of the insolvent were also parties and the point was raised before the learned Subordinate Judge that even if it be found that there was fraudulent preference, the mortgage must be held to be binding on the shares of the minor sons of the insolvent. Since the Subordinate Judge found that there was no fraudulent preference, he states in his judgment that it is unnecessary to consider the second point that was pressed before him on behalf of the mortgagee.

As already stated, the proceedings before the Subordinate Judge were started by the Official Receiver of Coimbatore. From the decision of the Subordinate Judge an appeal was preferred to the District Court of Coimbatore. This was done not by the Official Receiver but by one of the Creditors of the insolvent who it is conceded was entitled to do so. The learned District Judge has allowed the appeal holding that all the circumstances point to the fact that the insolvent, while unable to pay his debts, had with a fraudulent motive given preference to one of his creditors by executing the mortgage deed. This finding of the learned District Judge is attacked in revision.

The learned Advocate for the mortgagee petitioner argues that the lower appellate Court does not seem to have applied its mind at all to one of the most imporant documents relied upon

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by the petitioner in both the Courts below in support of the contention that there was pressure exercised by the creditor in whose favour the mortgage deed was executed. This document is Ex. V which would show that the mortgagee was pressing the mortgagor for payment of the debts which both the lower Courts have found were lawfully due to him and were in addition old debts due to him by the mortgagor. This letter which bears date 18th June, 1931 shows also that the creditor was threatening to file a suit. In this letter the mortgagor therefore appeals to the creditor not to sue him. He says that he is prepared either to sell or mortgage his lands and points out that even after money is expended in filing a suit and obtaining a decree against him the creditor can ultimately proceed only against these properties. He points out further that when he is willing to give these properties as security there is no need for the creditor to resort to litigation. The genuineness of this letter was not questioned before the lower Courts. The learned Subordinate Judge relied upon this letter and the oral evidence adduced before him. There is the evidence of the Official Receiver's own witness P. W. 3 who was a gumastah employed in the mortgagee's shop on the date the mortgage was executed but whose services were dispensed with subsequently. On the date on which the witness was examined before the Subordinate Judge he was not in the service of the mortgagee. His evidence is that he had attested the mortgage deed Ex. I, that the mortgagee had made a demand and that the debtor had said that he would execute a mortgage. The witness said at first in examination in chief that "no pressure was brought to bear on the debtor". In cross examination he states that his master's firm was making demands for payment and that it was after that that the mortgage-deed was executed. He also admits that the creditor was threatening to sue the debtor. A day prior to the execution of the mortgage deed a varthamanam letter was passed by the debtor to the creditor in which the former asked for a month's time to pay off the debt. In spite of that he was made to execute the mortgage on the following day. The respondent's first witness has given an explanation for this expeditious passing of the security and this has been accepted by the learned Subordinate Judge. It was that the witness who was one of the persons responsible for obtaining the mortgage deed was afraid that his master, the creditor,

might object to a month's time being given to the debtor to pay his debts and therefore a day after the varthamanam letter was passed, the mortgage deed was taken from the debtor. It may be mentioned here that it was a second mortgage.

The law on the subject of fraudulent preference is summarised in Mullah's Law of Insolvency at pages 443 and 448. Regarding the test to be applied, this is what the learned author says,

"In order to avoid a transaction as fraudulent preference it is not sufficient that the creditor was preferred; it is essential that the transfer or payment was made with a view to give preference to that creditor over the other creditors. The view to prefer must have been the dominant or substantial view; it is not necessary that it should have been the sole view."

Again at page 448 occur the following sentences.

"The transfer or payment made under a threat of legal proceedings whether civil or criminal, does not amount to a fraudulent preference, even though there is no immediate power of rendering the threat available by taking legal steps. Similarly a transfer or payment made under an apprehension of legal proceedings even though there has been no threat, demand or pressure from the creditor, does not amount to a fraudulent preference."

The case reported in *Ranga Reddy* v. *Official Receiver, Anantapur*[1], is strongly relied on by the petitioner's learned Advocate in support of his contentions. That was a case in which the debtor had executed a sale deed in favour of his nephew and son-in-law who was one of his creditors. At the trial the vendee even stated in cross examination that as he was the debtor's son-in-law the debtor wanted to pay him first. In spite of these circumstances it was held, applying the test laid down by Bowen L. J. in the case reported in *Ex parte Hill: In re Bird*[2], that the debtor had no idea of giving preference to the creditor, that such an idea was not the operative effectual view and that consequently there was no fraudulent preference of the creditor. The learned advocate for the respondent contends that in this decision the debtor had already committed a criminal offence and that it was to avoid the consequences that he executed the sale deed in question; but whether the proceedings threatened were civil or criminal will not according to the decision make any difference. So long as there was threat of civil proceedings to avoid which the debtor has made the alienation and so long as his dominant motive was not to fraudulently prefer a particular creditor the validity of the alienation cannot be challenged under Ss. 54 and 55 of the Provincial Insolvency

1. (1937) 2 M.L.J. 868. 2. (1883) 23 Ch.D. 695.

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Act. The case reported in *Arunachalam Chettiar* v. *Official Receiver, Tanjore*[1], which is relied on by the learned advocate for the respondent seems to have no application to the present case. As contended by the learned Advocate for the petitioner the question whether there was fraudulent preference or not is mainly a question of fact and it will depend upon the circumstances of each case. In the case in *Arunachalam Chettiar* v. *Official Receiver, Tanjore*[1], it was found by the learned Judges that one of the mortgage deeds executed by the debtor was undoubtedly a fraudulent transaction and that it was impossible in deciding the question of the debtor's motive in respect of another mortgage executed at or about the same time to treat the two transactions as absolutely distinct and separate from each other. There was a distinct finding in that case that the facts disclosed that at the time the alienation was made by the insolvents they were in desperate circumstances and were trying to part with their assets recklessly and desperately not caring what the consequence might be.

In the present case on the evidence placed before him the learned Subordinate Judge had arrived at the conclusion that the dominant motive of the debtor when he executed the mortgage was not to prefer the mortgagee to his other creditors but that the debtor was compelled to execute the mortgage deed under a threat of legal proceedings which would have led to costs being incurred by the debtor. The existence of the debt was not disputed. Even the learned District Judge states in his judgment that the consideration for the mortgage was not assailed before him. It seems to me in these circumstances that there was no warrant for the District Judge interfering with the finding of fact arrived at by the learned Subordinate Judge that in this case there was no fraudulent preference. The learned District Judge seems to have fallen into an error because he does not seem to have applied his mind to Ex. V, the genuineness of which was not attacked at any stage and which shows unmistakably that the creditor was pressing for payment and was threatening to file a suit against the debtor shortly before the execution of the mortgage deed. One of the reasons that induced the learned District Judge to hold that there was no pressure or threat of legal proceedings seems to be what is stated

1. (1925) 49 M.L.J. 562.

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in paragraph six of his judgment namely that the creditor did not even send a registered notice to the insolvent threatening him with a suit. The conclusion is irresistible that had the learned Judge looked at Ex. V he would certainly have been satisfied that the creditor was threatening to sue the debtor and the debtor was appealing fervently to the creditor not to resort to litigation. In these circumstances I am satisfied that the view taken by the learned Subordinate Judge is correct and that there was no valid reason for setting aside his decision.

Another defect in the learned District Judge's judgment is brought to my notice and that is that he has failed to deal with the second point that was raised before the learned Subordinate Judge, namely, that even though the mortgage is found to be fraudulent within the meaning of Ss. 54 and 55 of the Provincial Insolvency Act in respect of the insolvent's interest in the property yet the transaction must be held to be binding on the shares of the minor sons of the insolvent on whose behalf also he had executed the mortgage. This is a serious omission, but in view of the finding that I have recorded about the nature of the alienation it is not necessary to say anything more about it; nor is it necessary now to consider the question of the validity of the mortgage in respect of the shares of the insolvent's sons, since the finding of the learned Subordinate Judge is upheld here. I therefore set aside the decision of the learned District Judge and restore that of the learned Subordinate Judge. The petitioner shall have his costs both here and in the lower appellate Court.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Gopala Chettiar and others .. *Appellants** (*Plaintiffs*).

v.

Arasappa Pillai and others .. *Respondents* (*Defendants 2 to 9*).

Gopala Chettiar v. Arasappa Pillai.

Madras Estates Land Act (I of 1908), Chapter IV—Patta prima facie *evidence of title—Mortgage deed—Provision for relinquishment of patta in favour of mortgagee on failure to pay and redeem by mortgagor—Purchaser for value without notice of mortgage—Entitled to protection of S. 41, Transfer of Property Act (IV of 1882).*

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*S. A. No. 625 of 1936. 27th October, 1939.

Gopala Chettiar *v.* Arasappa Pillai.

Having regard to Chapter IV of the Madras Estates Land Act, a patta granted by a landholder in respect of a ryot's holding is strong *prima facie* evidence of title and thus stands on an essentially different footing from the entry of a previous name in accounts or records of the Revenue Department. As pointed out by the Privy Council in *Raja Srinath* v. *Maharaja Pratap*, (1923) M.W.N. 702 a patta granted by a Zamindar to his ryot is practically a title deed to the latter in respect of his holding.

Where a mortgage deed provided that if the mortgagor did not pay the amount borrowed and redeem the property mortgaged by failure to pay on the promised date, he would have to relinquish the title of the same by having the patta transferred to the mortgagee's name, and a *bona fide* purchaser for value without notice of the mortgage became owner of the property by having the patta in his name, on the question whether there was title in the purchaser by reason of estoppel under S. 41 of the Transfer of Property Act,

Held, that the question whether a person has taken reasonable care to ascertain that his transferor had power to make the transfer so as to get the protection of S. 41 of the Act is one of fact and has to be decided with reference to circumstances of each case. The findings below in the present case that the purchaser had taken all reasonable care to satisfy himself that his vendor had title to confer before he purchased the property were amply supported by evidence.

Appeal against the decree of the Court of the Subordinate Judge of Madura in Appeal Suit No. 38 of 1934, preferred against the decree of the Court of the District Munsiff of Tirumangalam in Original Suit No. 156 of 1932.

B. Sitarama Rao, R. Ramasubbu Aiyar and *M. V. Ganapathi* for Appellants.

T. P. Gopalakrishna Aiyar, for Respondents.

The Court delivered the following

JUDGMENT:—This appeal arises out of a suit brought by the appellants to redeem an usufructuary mortgage executed by their father in favour of one Madasami Pillai on 21st March, 1877. The respondents 1 to 5 and 7 are the heirs of Madasami Pillai and the 6th respondent is the purchaser of the property from them. Both the Courts below have dismissed the suit on the ground firstly that the mortgagor's title was extinguished by the adverse possession of Madasmi and his successors for over the statutory period, and secondly, that, in any case, the 6th respondent acquired a valid title by estoppel as against the appellants under S. 41 of the Transfer of Property Act as a *bona fide* purchaser for value. Mr. Sitarama Rao, the learned counsel for the appellants, contests the validity of both these conclusions in this appeal.

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The facts so far as they are material for the purpose of the appeal may be briefly stated. The mortgage deed, marked as Ex. A in the case, provided that—

"Before 30th Vaigasi of Bahudanya year (11th June, 1878), I shall pay the amount and redeem the land. In case of failure to make payment on that due date, I shall present a petition for relinquishment and get patta entered in your name, in respect of the aforesaid land."

The mortgagor did not redeem by the due date and it appears from Ex. IX, a copy of a statement made by Madasami in 1897, that the mortgagor sold the property to him and filed a patta transfer petition for the issue of patta in Madasami's name, in respect of the property. It has been found by both the lower Courts that pattas had stood in the names of Madasami and his heirs at least from 1897 and that these persons had been in possession and enjoyment throughout, dealing with the property as if it was their own by mortgaging or leasing out the same from time to time till they sold it to the 6th respondent under Ex. II on 27th May, 1918.

On the question of the 6th respondent's title by estoppel under S. 41 of the Transfer of Property Act, Mr. Sitarama Rao argued that the mere existence of patta in the name of Madasami Pillai cannot be taken as showing that he had title to the property as patta is not evidence of title and that if the 6th respondent had taken reasonable care to ascertain whether his transferors had power to make the transfer, he would have found that they had only a mortgagee's interest and nothing more in the property, assuming, of course, for the purpose of this argument, that the mortgagor's title was not extinguished by adverse possession. Reliance was placed on *Merwanji Muncherji Cama* v. *Secretary of State for India*[1], where their Lordships of the Privy Council held that an entry as to the tenure of a certain land in a rent roll maintained by the Collector of Bombay in accordance with the provisions of the Bombay City Land Revenue Act did not create any estoppel against the Government, having regard to the object and purposes for which the statute required the rent rolls to be maintained. The learned Counsel also cited *Kartar Singh* v. *Mst. Mehr Nishan*[2], (entry in Kasra Paimash), *Balasidhantam* v. *Perumal Chetti*[3], (entry in Collector's certificate for quit rent purposes) and

1. (1915) 29 M.L.J. 299: 12 I.A. 185: 39 Bom. 664 (P.C.).
2. (1934) 16 Lah. 313.
3. (1914) 27 M.L.J. 475: 1 L.W. 641.

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Pratap Chand v. *Saiyida Bibi*[1], (entry in zamin revenue papers) to show that the mere entry of the name of a person as owner of certain property in such accounts or records cannot be regarded as sufficient to induce others to believe that he was the ostensible owner for the purposes of S. 41 of the Transfer of Property Act. This contention, in my opinion, cannot be accepted. Having regard to the Provisions of Chapter IV of the Madras Estates Land Act, a patta granted by a landholder in respect of a ryot's holding is strong *prima facie* evidence of title and thus stands on an essentially different footing from the entry of a person's name in such accounts or records as are mentioned in the cases referred to above. As pointed out by their Lordships of the Privy Council in *Raja Srinath* v. *Maharaja Pratap*[2], a patta granted by a zamindar to his ryot is practically a title deed to the latter in respect of his holding. See also *Donganna* v. *Jammanna*[3], where it is recognised that patta is evidence of title. The decisions cited by Mr. Sitarama Rao which are largely based on their own peculiar facts are not therefore applicable to this case. The question whether a person has taken reasonable care to ascertain that his transferor had power to make the transfer, so as to get the protection of S. 41 of the Transfer of Property Act, is one of fact and has to be decided with reference to the circumstances of each case, and the findings of the Courts below that in this case the 6th respondent took all reasonable care to satisfy himself that his vendors had title to convey before he purchased the property under Ex. II are amply supported by the circumstances and the evidence referred to in their judgments.

As this is sufficient to dispose of the appeal, it is unnecessary to consider the question whether the possession of Madasami and his successors subsequent to the oral sale and transfer of patta could be deemed to have become adverse to the mortgagor so as to extinguish latter's title to the property after 12 years.

The appeal therefore fails and is dismissed with costs of respondents 6 and 8.

Leave refused.

K. C. *Appeal dismissed.*

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1. (1901) 23 All. 442.
2. 1923) M.W.N. 702 (P.C.).
3. A.I.R. 1931 Mad. 613.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD THANKERTON, SIR GEORGE RANKIN AND SIR PHILIP MACDONELL.

Sunil Kumar Kerr .. *Appellant**

v.

Sisir Kumar Kerr and others .. *Respondents.*

P.C. Sunil Kumar Kerr *v.* Sisir Kumar Kerr.

Indian Succession Act (XXXIX of 1925), S. 307, sub-Ss. 1 and 2—Executor's statutory power to mortgage immoveable property—Mortgagees if bound to enquire into facts outside the will as they existed immediately prior to the testator's death.

Executors were authorised by the will to carry on the testator's business and they raised money on a mortgage under their statutory powers. The will contained no restrictions on the statutory power. There was no evidence that the mortgagees knew anything outside the terms of the will and the recital in the mortgage,

Held, it must be assumed that in a question between the executors and the beneficiaries, the executors were not entitled to use the immovable properties for the purposes of the business. The mortgagees had no duty to enquire into facts outside the will as they existed immediately prior to the testator's death. Much of the usefulness of the statutory power conferred by S. 307 on executors in India would be nullified if such a duty of inquiry was imposed on parties dealing with executors. The mortgage is valid and binding.

Appeal from a judgment† and decree of the High Court, Calcutta.

L. P. E. Pugh, K. C. and *S. P. Khambatta* for Appellant.

Sir Herbert Cunliffe, K. C. and *J. M. Pringle* for Respondents.

10th November, 1939. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—The only question in this appeal is whether two mortgages executed by the executors of Thakur Das Kerr are binding on the estate of Thakur Das Kerr and on the properties which are the subject of the mortgages. The issue arises in a suit filed by the appellant and respondents Nos. 1 and 2 on the 31st August, 1929, for construction of the will of Thakur Das Kerr and for certain declarations, including a declaration that the said mortgages are invalid, inoperative and nullities and do not in any way bind the estate of the

* P. C. Appeal No. 91 of 1936. Bengal Appeal No. 72 of 1932. 10th November, 1939.

† I.L.R. 62 Cal. 552.

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testator. Respondents Nos. 5 and 6, who alone appear in the appeal, are the representatives of the mortgagee under the first of the two mortgages. This appeal is against the judgment and decree of the High Court of Judicature at Fort William in Bengal, in its appellate jurisdiction, dated the 7th December, 1934, which, as regards the declaration in question, affirmed the judgment of the said High Court in its ordinary original civil jurisdiction, made by Ameer Ali J., and dated the 18th January, 1932, which dismissed the suit as regards the said declaration.

The testator died on the 5th October, 1919, leaving a will dated the 16th December, 1917, and a codicil dated the 16th April, 1919, the latter of which is not material. He was survived by a widow, four sons and three grandsons. Respondents Nos. 3 and 4 are two of the sons, and are the executors of the will. The three grandsons are sons of respondent No. 4 and are the appellant and respondents Nos. 1 and 2.

At the time of his death, the testator was the owner of a printing, publishing and bookselling business which he had started and carried on successfully under the name of R. Cambray & Company for about 25 years. In addition to a share in ancestral property in his village of Nalkorah, he died possessed of zemindari property outside Calcutta in Baraset and Bashirat sub-Divisions, house property in Calcutta, Government Promissory Notes, War Stock, and shares in railways, banks and various companies, all of which he had acquired out of the profits of the business.

The house property in Calcutta consisted of,

(*a*) Nos. 11-A and 11/1 Halder Lane, which were used as the family dwelling-house, and in which the printing was done until 1915.

(*b*) No. 3 Halder Lane, to which the printing press was transferred when it was acquired in 1915.

(*c*) Nos. 5 and 6 Halder Lane, which were acquired in 1913 and 1911 respectively, and which were let.

The main business was carried on in hired premises in Hastings Street, with a branch in College Square.

The material provisions of the will are as follows:

"(2) I appoint my sons Dhirendra Chandra Kerr and Narendra Chandra Kerr to be the executors of this my Will with full authority to carry on the printing, publishing and bookselling business now carried on by me under the name and style of R. Cambray & Co.

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"(7) I will and direct that my sons with their respective families (if any) shall be entitled to reside in my said house at Bowbazar and at the ancestral house at Nalkorah in such manner as they may choose and to be maintained out of the income of my estate in the manner prevalent in my lifetime. If any of my sons or their widows do not reside in either of my said houses he or she will not be entitled to maintenance of my estate.

"(8) I will and direct that my said sons Dhirendra Chandra Kerr and Narendra Chandra Kerr shall receive a monthly sum or allowance of Rs. 52 and 50 respectively as remuneration for looking after the management of my estate.

"(10) I further will and direct that my executors shall be authorised in their absolute discretion to employ my sons Satyendra Chandra Kerr and Sailendra Chandra Kerr in the management of my estate and give each of them while so employed a salary or allowance of Rs. 15 raising to Rs. 30 a month according to ability. My said son Sriman Satyendra will not be entitled to any allowance if he refuses to be employed as aforesaid. My youngest son Sriman Sailendra besides the allowance provided herein being further entitled to a sum of Rs. 1,000 towards his marriage.

"(15) I further declare it to be my express will and intention that after paying the annuities and meeting the expenses hereby directed as aforesaid the residue of the income of my estate shall be invested in Government Promissory Notes or in purchasing profitable property in the vicinity of my said Bowbazar house or of my said ancestral house at Nalkorah and the said Government Promissory Notes or the property as the case may be shall form a part of my estate.

"(16) I further declare it to be my express will and intention that the monthly sum or salary hereby directed to be paid to my sons shall on their respective deaths be payable to their respective male descendants then alive in equal shares if more than one.

"(18) I lastly give devise and bequeath the rest and residue of my estate in equal shares to the male descendants of my sons living at the death of my last surviving son, those in whose descent from me a living ancestor shall intervene being excluded by the others."

The will was duly proved, and respondents 3 and 4, as executors, took possession of the estate and carried on the business.

On the 11th April, 1927, respondents 3 and 4, as executors executed a mortgage in favour of Sreemutty Indira Ghosh, whom respondents 5 and 6 now represent, of the five properties in Halder Lane, to secure a sum of Rs. 65,000 with interest at 9 per cent. The mortgage, after a reference to the will, contained the following recital:—

"Whereas by the said will the testator authorised the said mortgagors to carry on the printing, publishing and bookselling business carried on by the testator in his lifetime under the name and style of R. Cambray & Co., in Calcutta and elsewhere, and whereas the said mortgagors are about to enter into contracts with the Governments of three Presidencies, namely, Bombay, Madras and Allahabad and also local Government for the exclusive licence to publish and issue verbatim reprint of the Indian Law Reports from the

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year 1921 to 1925, and whereas to fulfil the said contracts the mortgagors are in need of Rs. 65,000."

On the 3rd September, 1927, the executors executed a first mortgage of the goodwill and connection of R. Cambray & Co. and the book debts outstanding and the stock in trade thereof and a second mortgage of the Halder Lane properties in favour of respondent No. 7, to secure a sum of Rs. 7,500 with interest at 10 per cent. This mortgage contained recitals similar to those in the first mortgage.

In fact, the printing and publishing of the reprints were carried out at a new branch at Madras, mainly owing to the cheaper cost of printing in Madras.

Both the Courts below have decided, on the terms of the will and the evidence, that these immoveable properties were so connected with the business by the testator that the executors were entitled to mortgage them for the purposes of the business. It is true that Ameer Ali, J., lays stress rather on the terms of the will but the Appellate Court clearly relied on the evidence as to the testator's practice in treatment of his estate. Jack, J., in whose judgment Lort-Williams, J., concurred, said:

"In this case the evidence shows that the testator pooled all his liquid funds together and mixed up the accounts of his property with those of his business, taking the expenses connected with both from the common fund. It is true that though he mortgaged promissory notes for the purposes of the business, he never mortgaged his immoveable properties for that purpose. Except his ancestral properties, the remainder of his house properties including those in Calcutta, had been purchased from the profits of the business, and in one of the houses a printing press had been established. It is admitted that had funds been required for the protection of his house properties in an emergency, the executors would have been entitled to take them from the business. The beneficiaries of both the business and the house properties were the same and the executors were appointed managers of both. In these circumstances, it is difficult to say that the Calcutta house properties could be regarded as quite unconnected with the business so as not to be available in order to raise funds for the business when required."

These decisions settled not only that the mortgagees got a good title, but that, in a question with the beneficiaries, the executors were entitled to mortgage the properties.

At the hearing before the Board, the appellant put forward a contention to the effect that, at the date of the mortgage, the executors had assented to the trusts as regards both the business and the immoveable properties, which had thereby become vested in them as trustees, and that, accordingly, the powers conferred on executors by S. 307 of the Succession Act, 1925, were no

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longer available to them. Whether this consequence would result from assent need not here be determined. The question of assent, in such circumstances, is a question of fact, and this question had not been put in issue or maintained in the Courts below; their Lordships are not satisfied that the evidence already taken establishes beyond doubt that the facts, if fully investigated, would have supported the plea, and therefore, in accordance with the practice of this Board, they are unable to entertain this plea at this late stage. *Connecticut Fire Insurance Company* v. *Kavanagh*[1]. It follows that, when they granted these mortgages, the executors, in a question between the estate and the mortgagees, must be taken to have had the powers conferred by S. 307 of the Succession Act, and only two questions arise for consideration. Firstly, having regard to S. 307 (2) (*i*), was any restriction on the statutory power imposed by the will in this case, and, secondly, had the mortgagees constructive notice of any defect in the proposed exercise of the power, so as to put them in bad faith?

On the first point, their Lordships are unable to find in the will any restriction imposed on the statutory power of disposal. On the second point, it is necessary to assume, contrary to the judgments below, that, in a question between the executors and the beneficiaries, the executors were not entitled to use the immoveable properties for the purposes of the business. If so, did the mortgagees know, or were they so put on their enquiry that constructive knowledge must be imputed to them, that the executors were not so entitled?

There is no evidence that the mortgagees knew anything outside the terms of the will and the recital in the mortgage. These told them nothing as to the starting of a new branch at Madras, and nothing as to the testator's practice, at the time of his death, with regard to treating the properties as connected with the business. Indeed, the will suggests that they are to be managed as one unit for the benefit of one set of beneficiaries. But, the question must be whether the proposed lenders had a duty to enquire into facts outside the will as they existed immediately prior to the testator's death. Their Lordships are unable to hold that the mortgagees had any such duty, and the nature of the enquiry held in the present case and the decisions below, show how impracticable it would be for any such enquiry

1. (1892) A.C. 473 at 481.

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to be made by an intending lender. In their Lordships' opinion, much of the usefulness of the statutory power conferred by S. 307 on executors in India would be nullified, if such a duty of enquiry was imposed on parties dealing with executors.

Their Lordships are therefore of opinion that the mortgagees got a good title from the executors and it becomes unnecessary to consider whether the ground of decision of the Courts below was justified, but their Lordships are not to be taken as indicating any contrary opinion.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs and that the judgments appealed from should be affirmed.

Solicitors for Appellant: *W. W. Young, Sons & Ward.*

Solicitors for Respondents Nos. 5 and 6: *A. J. Hunter & Co.*

K. S. *Appeal dismissed.*

R. C. C.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

Goona Durgaprasada Rao *alias* Pedda Babu and another .. *Appellants** (*Plaintiffs*).

v.

Goona Sudarsanaswami and others. *Respondents.* (*Defendants 1 to 5, 7 and 9 to 31*).

Durgaprasada Rao *v.* Sudarsanaswami.

Hindu Law—Re-conversion to Hinduism—If valid without formal renunciation of Christianity and performance of expiatory ceremonies.

A Hindu having renounced Hinduism once can revert back to it. The absence of a ceremony of reconversion or any other expiatory ceremony does not, in all cases, render a return to Hinduism and marriage with a Hindu woman invalid. Emphasis is to be laid on the prevailing sentiments and usages of the community and it is its approval or disapproval which should be the governing factor.

Case-law discussed.

Appeal against the decree of the District Court of Ganjam dated 24th October, 1935 and passed in O. S. No. 26 of 1931.

The facts appear sufficiently from the judgment of Krishnaswami Ayyangar, J.

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* Appeal No. 190 of 1936. 27th October, 1939.

Durga-prasada Rao v. Sudarsana-swami.

Mockett, J.

B. Jagannadha Das and *C. V. Dikshatulu* for Appellants.

C. Sambasiva Rao and *S. Suryaprakasam* for Respondents.

The Court delivered the following Judgments:

Mockett, J.—I concur generally with the judgment which my learned brother is about to deliver, and I am not proposing to restate the facts which are clearly set out in the judgments of the learned Trial Judge and of my learned brother. I desire however to deal with the important question raised by issue 11 in this case which is:

"Whether the late G. M. Appalaswami Naidu was a Roman Catholic, not governed by Hindu Law, at the time of his death."

[After discussing the evidence his Lordship continued.]

But the whole evidence points to the conclusion that so far as he was concerned—and I use that expression advisedly—he abandoned the Christian religion at the time of his marriage to Appalanarasamma in 1913 and lived and worshipped as a Hindu up to the time of his death and was cremated. None of the defendants have gone into the witness box to deny any of the facts proved by the plaintiff, and it must be emphasised that it has never been suggested from the Bar, although we asked the question, that this was a suit in which the plaintiff and defendants were colluding together to defeat alienees. We obtained that definite assurance because it naturally would be an important element in weighing the evidence in the case. The learned trial Judge too arrived at the conclusion in paragraph 19 of his judgment,

"that Goona Appalaswami was what is known in some of the southern districts as a caste Christian, that is a Christian by religion but following Hindu customs, manners and habits."

On the evidence in this case, I am not prepared to agree with that finding. The evidence, virtually uncontradicted, shows that Appalaswami from 1913 went far beyond clinging to Hindu customs and associations. He worshipped as a Hindu. There is no suggestion in the evidence that he ever entered a Church after 1913. There is however uncontradicted evidence that he attended temples. It would seem however that the *ratio decidendi* of the lower Court in this case amounts to this. On the decisions, says the learned Judge

"there must be a renunciation or renouncement of the new religion and a readmission into the old. Without something definitely done in both these directions, it cannot be said that a Christian can become a Hindu or *vice versa*."

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This is of course a case not of conversion to Hinduism but of a Hindu reverting to his original faith. The learned trial Judge takes the view apparently that there must be proof of some formal abandonment of one religion and the adoption of another. We have been referred to the decisions bearing on this topic. *Administrator-General of Madras* v. *Anandachari*[1], is a judgment of Parker, J. In dealing with the possible re-admission of one Kristammal to Brahminism, the learned Judge makes the following remarks:

"His conversion to Christianity according to the Hindu Law, rendered him an outcaste and degraded. But according to that law, the degradation might have been atoned for, and the convert readmitted to his status as a Brahmin, had he at any time during his life renounced Christianity and performed the rites of expiation enjoined by his caste."

It seems to me that that statement remains as it is, if the words "if any" are added at the end of the sentence. In 1934, Mr, Justice Varadachariar, decided a case in *Gurusami Nadar* v. *Irulappa Konar*[2], and he states:

"The language used in *Administrator-General of Madras* v. *Anandachari*[1], merely refers to the expiatory ceremonies enjoined by the practice of the community in question; and with reference to the class of people we are now concerned with, no suggestion has anywhere been made in the course of the evidence that any particular expiatory ceremonies are observed amongst them. No particular ceremonies are prescribed for them by the Smriti writers nor have they got to perform any Homas. One has therefore only to look at the sense of the community and from that point of view it is of particular significance that the community was prepared to receive Vedanayaga and the 5th defendant as man and wife and their issue as legitimate."

Mr. Justice Varadachariar also deals with the decisions on this matter so far as the law of bigamy is concerned. I do not consider the criminal aspect of this matter assists except to the extent that, as is obvious, conversions or re-conversions are recognised by the Courts. I respectfuly agree with Varadachariar J., that because in *Morarji* v. *The Administrator-General of Madras*[3], Venkatasubba Rao, J., referred to several facts as proved and relied upon as establishing a conversion, it is erroneous to hold that it has been laid down by the learned Judge that all those facts must be proved to exist before the Court could give a finding in favour of a conversion. Indeed in *Ramayya* v. *Josephine Elizabeth*[4], Venkatasubba Rao, J., himself has made this quite clear. No general law has been

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1. (1886) I.L.R. 9 Mad. 466. 2. (1934) 67 M.L.J. 389.
3. (1928) 55 M.L.J. 478: I.L.R. 52 Mad. 160.
4. (1936) 44 L.W. 854.

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cited to us with regard to any particular ceremonial being necessary before a conversion or re-conversion is validated. That in many castes they insist upon such ceremonies is probable, but that is a question rather of custom than of law. It seems to me that no special test could be laid down as applicable to all cases. On the other hand, I consider that whether there has been a conversion or re-conversion must be a question of fact in each particular case and it may well be that in any particular case the consideration whether any essential ceremonial has been performed may be of importance. We have had no evidence before us of the necessity of any ceremonial in Vada Baliji fisherman community of Gopalpur and this decision deals with readmission to that community. On the other hand, it is clear that Appalaswami Naidu was admitted to caste and worship by his caste men. I entirely agree that no gesture or declaration can change a man's religion, but equally I cannot see why, when on the facts it appears that a man did change his religion and was accepted by his co-religionists as having changed his religion, and lived, died and was cremated in that religion, the absence of some formality should negative what is an actual fact. It seems to me somewhat analogous to the legal position with regard to change of domicile which must always be a question of fact in every particular case. I naturally differ from the experienced Judge who has tried this case with great hesitation on a topic of this sort, but it seems to me that his decision rests on the absence of a formal renunciation of religion and the absence of proof of performance of expiatory ceremonies and there is no warrant for holding that either of these two ingredients is essential in all cases. My conclusion in short is that on the evidence it is shown that in fact Appalaswami returned to Hinduism at the time of his marriage in 1913 and remained and died a Hindu and was accepted as such by his co-religionists without demur and that the probabilities are that this caste does not insist on any ritual in such matters. On the other matters which have been argued before us, I generally agree with my learned brother.

This appeal is allowed and the decree of the lower Court set aside as against respondents 1 to 5. As against the other respondents, the decree is confirmed. The suit is remanded to the lower Court for disposal according to law. The appellants will have their costs in the trial Court against respondents I to 4 and also against respondents 11-15, 17,

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18, 21-26 and 28 but in this Court the appellants will bear their own costs so far as these respondents (1 to 4) are concerned. The appellants will pay the Court-fee due to Government both here and in the lower Court in the first instance, but the amount will come out of the estate and will be provided for in the final decree in proportion to the parties' respective shares.

The appellants must pay the costs of respondents 6, 10 and 29.

Krishna-swami Ayyangar, J.

Krishnaswami Ayyangar, J.—A question of some importance and difficulty arises for decision in this appeal. It is whether a Hindu convert to Christianity can, without the performance of a formal expiatory ceremony, come back to Hinduism, under the Hindu law. It is extremely doubtful whether the ancient Hindu law and the texts and Smrithis permitted the return into the fold of an apostate who had wilfully and deliberately chosen to abandon the religion of his birth to become a convert to an alien faith, which holds the Hindu religion in contempt. Apostasy was a sin which was probably regarded as not capable of condonation or expiation by mere Prayaschittic ceremonies. The Hindu Society of old, had it been governed purely by the Smrithis and Dharma Sastras, might in all probability have refused to readmit the convert to social or religious communion. Before us, however, no Hindu law texts were cited as governing the matter or tending to throw any light on the question. In fact, the examination of the few cases bearing on the subject has left the impression that the consideration of the topic has to be approached not from the point of view of strict religion or the views of ancient law givers but on a fair appreciation of the current sentiments and usages of the particular community into which the convert seeks re-admission.

It is not necessary except very briefly to refer to the facts established. The two appellants claim a share in the properties left by one Goona Appalaswami who died in 1921 at the age of 40. He was born in a community of Hindu fishermen, of the caste called Vada Balijis of Gopalpur. At a very young age when he was barely 12, he seems to have been converted to the Roman Catholic faith. This event took place in 1893 and is evidenced by a baptismal certificate Ex. X-B. In 1898, his first marriage took place with the fifth defendant in the suit out of which this appeal has arisen. The marriage was according

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to the Christian form, the bride embracing Christianity on the same day as the marriage, probably a little earlier. There were four sons of this marriage and they were defendants 1 to 4 in the Court below and have been joined as respondents 1 to 4 here, though they have been unrepresented before us. There is no question raised about the validity of this marriage either here or in the trial Court. It is obvious and it is scarcely likely that Appalaswami took to Christianity out of religious conviction. His age at the time and his life and conduct afterwards suggest the contrary, though down to 1913, there is reason for thinking he kept contact with the *padres* and the church. It is however undeniable that his outward bearing and habits almost from the beginning were more those of a Hindu than a Christian and as he advanced in life, he drifted more and more to his faith which was the faith of most of his relations and friends. It is difficult to fix any point of time at which he could be said to have definitely abjured Christianity and re-entered the religion of his forefathers. It is certain, however, that no formal ceremonies of any kind were undergone by him such as are sometimes resorted to in the present day, when a non-Hindu desires to become a convert to the Hindu religion.

In 1913 Appalaswami married his deceased younger brother Aiyappa's widow, Appalanarasamma as his second wife while the first was still living with him and the marriage with her yet in force. The appellants are the sons of Appalaswami by this second wife Appalanarasamma. The deceased brother, Aiyappa had himself been converted to Christianity in 1899, and it was as a Christian that he had married according to Christian rites Appalanarasamma who had also been by that time converted to the same faith. It is plain that if Appalaswami had continued to be a Christian, the objection to what would have amounted to a bigamous alliance would have been insuperable. If however he had turned Hindu, the way would have been smoothed for a valid second marriage, with the aid of the custom of his caste which would have come to his rescue in overcoming the objection to marrying a brother's widow abhorrent to ordinary Hindu law and sentiment. The appellants' case which is supported by the uncontradicted evidence of their mother Appalanarasamma is that she was married not in the Christian form but according to the form prevalent in the Baliji community and this, in our opinion, is satisfactorily established. There is evidence sufficient to justify us in holding that the relationship between Appala-

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swami and Appalanarasamma was similar to that subsisting between married spouses living in lawful wedlock and it was so regarded by the members of his family no less by his caste. If it was the intention of Appalaswami to take Appalanarasamma as his wedded wife, we think it was, it is clear that by the date of the marriage, if not before, he must have definitely made up his mind to abjure Christianity for good and become a Hindu in every respect. Otherwise, it would have been impossible for him to confer on Appalanarasamma the status of a married wife. In fact the entire evidence fits in with this view of the facts. There is no proof of any contact with the Church or the *padres* after the marriage. On the contrary as the learned Judge has pointed out, Appalaswami was in habits and worship a Hindu, observing the Hindu usages and forms of worship at home and on special occasions. He used to wear a big namam on his forehead, attended the local temples and the jatras, observed Hindu vratams and festivals, worshipped idols and the sacred Tulasi, and listened with interest to the Puranas and took vows for Hindu Gods. The birth certificates of the appellants describe them as Hindus. The sons of the first wife married in Hindu families and according to Hindu rites and customs. The whole Baliji community seems to have accepted the entire family as still in the caste and finally when the brothers Aiyappa and Appalaswami died, they were both without doubt cremated and Brindavans erected over their ashes. It is in fact difficult to conceive of a more complete reversion to Hinduism or a clearer abandonment of Christianity. The plaintiffs and their mother, not to mention the other members of the family, were throughout over a fairly long period received and treated by the entire Hindu community as Hindus without the slightest trace of any objection or dissent. These facts make it apparent that the case before us is not in any way similar to the kind of life lived by certain Catholic Christians in Tinnevelly or South Kanara. With them, the old customs and associations may persist to some extent in the matter of dress, manners and even as regards social barriers of caste unknown to Christian society; but in essential matters they hold fast to Christianity in faith and will not be allowed to swerve from it. They attend service in the Church, and do not, and will not be allowed to attend Hindu temples or worship Hindu deities. There can be no question of course of inter-marriages with Hindus. What is remarkable in this case is that there is not the slighest evidence

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after 1912 or 1913 of Appalaswami or any of the members of his family having ever evinced any interest in Christianity or done anything to indicate that they paid even formal allegiance to its tenets or observances. The learned Judge is inclined to accept the case of the appellants in this regard but is of opinion that he could not uphold the validity of the marriage of their mother with Appalaswami, as Appalaswami could not become a Hindu without formally renouncing Christianity and securing re-admission into Hindu society by the performance of expiatory ceremonies. The only point for consideration is whether the learned Judge is right in this view. We are not inclined to attach weight in themselves to reasons of policy or convenience which appear to have influenced the mind of the learned Judge. That society might get into a state of flux and confusion if a formal abandonment followed by the performance of expiatory ceremonies is not insisted on, is scarcely a sound reason for the Court lending its support to maintain a social order if the society concerned has itself lost faith in it. In matters affecting the well-being or composition of a caste, the caste itself is the Supreme Judge. If a caste is found to have given up certain old notions and practices and adopted new ones not in any way repugnant to morality, such usages should be respected. The function of the Court is merely to ascertain the law, or the effect of usages having the force of law, and to apply it without being involved in the tangles of policies and expediencies. Any other course would lead to disastrous results, and introduce uncertainty and confusion into the administration of justice. The Hindu law of today is after all but a bundle of customs and usages approximating more or less to certain ancient standards fixed by wise men of an ancient age. At no time did those standards and the rules in which they found expression attain to univeral acceptance in the country, even among communities professing the Hindu faith. Among the lower castes in particular there have been usages of an alien origin which have persisted through the ages, and for that reason consistently upheld by the Courts. We cannot shut our eyes to changes almost revolutionary in character and extent which have been for a considerable time past taking place in the structure of the Hindu social order, and in the ideas and sentiments which govern it. The old sanctions seem to have all but disappeared sweeping away before them the old faith and the old institutions which did constitute in the past an integral condition of

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the indigenous social fabric. The attitude of neutrality on the part of the Government in matters appertaining to religion and religious belief which is now of course a thing of the past, while it did not start, did not restrain the forces of disintegration which began early to assert themselves. Members even of the higher castes accustomed to strict discipline chafed under the old restrictions which to them had ceased to have a meaning and threw them off with impunity. Liberties were taken by individuals, and almost silently acquiesced in by society, tending naturally to destroy faith in the time-old articles. In view of the forces at work it is no surprise that as early as 1903, the Privy Council refused to permit a departure from the orthodox standards in matters of diet or ceremonial observances to affect the status and civil rights of the erring individual—*Bhagwan Koer* v. *Bose*[1]. Expiations for many transgressions which in the past would have been insisted, were and are now scarcely considered necessary or perhaps considered unnecessary. A true and genuine change of heart, rather than the adoption of mere formalism is the consideration that would in modern conditions appeal most to the modern mind. These observations are made not for the purpose of comment or criticism on current social trends, but only for furnishing the necessary background against which the learned Judge's opinion has to be viewed. Considerations such as these seem to my mind to have been in fact, at the back of the mind of the learned Judges who were responsible for the weighty pronouncements in the cases, to be presently noticed.

The subject received the most careful and elaborate consideration at the hands of Sankaran Nair, J. in *Muthusami Mudaliar* v. *Masilamani*[2]. He expressed the opinion which has never since been departed from in this Court that a marriage contracted according to Hindu rites by a Hindu with a Christian woman who before marriage had been converted to Hinduism is valid if such marriages are common among and recognised as valid by the custom of the caste to which the man belongs,—though not in strict conformity with orthodox Hindu religion. He declared in effect that where a caste accepts a marriage as valid and treats the parties thereto as members of the caste, the

1. (1903) 13 M.L.J. 381: 30 I.A. 249: 31 Cal. 11 at 33 (P.C.).
2. (1909) 20 M.L.J. 49: 33 Mad. 342.

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Court will not condemn it as invalid unless it is repugnant to the ordinary notions of morality. The correct test to be applied is contained in the following observation namely, that,

> "if according to the usage of the community a marriage is valid or the community recognise a marriage as valid, then, in the absence of any statutory prohibition, I fail to see why it should not be recognised as valid, even without the requisites of a valid custom in derogation of what may be styled the ordinary Hindu Law unless it offends against rules which would render any other marriage invalid."

The importance of this clear statement of the law in relation to the present case is not to be ignored. Indeed it furnishes the clue. Emphasis is therefore to be laid on the prevailing sentiment and usages of the community and it is its approval or disapproval which should be the governing factor. There is, it may at once be mentioned, not a vestige of disapproval of the marriage by the community in the present case, but on the contrary it seems to have set its stamp of complete approval on it. What is of supreme importance is that not even suggestion is to be found in the evidence about the necessity for expiatory ceremonies in the Baliji caste, before a convert is received back into its fold. It is hardly right for the Court to erect a barrier which the autonomy of the caste does not see fit to do simply because in some other caste or some other community, it might be considered proper that an expiatory ceremony should be performed. That a Hindu having renounced Hinduism once, can revert back to it scarcely admits of doubt[1]. *Kusum Kumari Roy* v. *Satya Ranjan Das*[2], *Morarji* v. *Administrator-General of Madras*[3]. It cannot be denied that many tribes of old, of non-Aryan origin and descent merged into the Hindu population accepting the Hindu religion. It is certain that large hordes of Scythians, Yavanas, Kirathas, Kambhojas and Persians entered India in ancient times, but their identity has now been completely lost. They have been in fact assimilated into one or other of the component parts of the Hindu society, even as the descendants of the old Buddhists who at one time formed the dominant element in the land, have been absorbed by it. The process of absorption is still active with Arya Samajists taking the lead with their Sudhi movement, the only new factor being the entry of political considerations into the field. Modern instances of even European

1. 3 M. H. C. R. Ap. VII. *Proceedings dated 8th November, 1866.*
2. (1903) 30 Cal. 999.
3. (1928) 55 M.L.J. 478: 52 Mad. 160.

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or American Christians being converted into Hinduism, shows the degree of tolerance and accommodation that Hindu society has shown itself to be capable of. *Morarji* v. *Administrator General of Madras*[1], furnishes a recent illustration, where the admission into the Hindu fold of a lady Austrian by birth, and British by domicile was upheld and the succession to her estate was allowed to be regulated on the footing that she had become a Hindu. Venkatasubba Rao, J. held that it is a question of fact in each case whether a given person is a Hindu or not. In coming to a conclusion on that question he took note among other things of the formal ceremony of conversion which the lady had undergone. But he never meant to lay it down as a proposition of law that a ceremony of conversion or any form of expiatory ceremony was an essential preliminary to a valid conversion. The error of this view has been pointed out by Varadachariar, J. in *Gurusami Nadar* v. *Irulappa Konar*[2], and by Venkatasubba Rao, J. himself in *Ramayya* v. *Joshephine Elizabeth*[3]. In the former case, the learned Judge after pointing out that no particular expiatory ceremonies were prescribed in the community in question in that case emphasised the necessity for looking to the sense of the community and considering whether it was prepared to receive back the convert into its fold. According to him a formal ceremony would not be insisted on except possibly in the twice born castes. In the latter case, Venkatasubba Rao, J. had his own prior decision quoted to him in support of the contention that expiatory ceremony was necessary, but he definitely ruled that a formal conversion is not a pre-requisite to a person becoming a Hindu. The learned Judge in the Court below did not have the advantage of this explanation, and was inclined in its absence to treat the views of Varadachariar, J. as *obiter*. It is now patent that he fell into an error in so doing. We must accordingly hold that there is no authority in support of the learned District Judge's view that on account of the absence of a ceremony of reconversion or any other expiatory ceremony, the Court is bound to treat Appalaswami as having continued to remain a Christian, and his marriage with Appalanarasamma as invalid.

The result is that the appeal has to be allowed and the decree of the lower Court set aside as regards respondents

1. (1928) 55 M.L.J. 478 : I.L.R. 52 Mad. 160.
2. (1934) 67 M.L.J. 389.
3. (1936) 44 L.W. 854.

1 to 5. Respondents 6, 10, 12 and 29 are the alienees of portions of the properties left by the deceased Appalaswami. The alienations in their favour have been rightly upheld by the Court below, and not seriously challenged before us. The suit is remanded for a preliminary decree to be passed by the lower Court and further steps to be taken according to law for giving effect to the rights of the appellants as the legitimate sons of Appalaswami to shares in the estate left by him.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Attili Rajagopala Rao .. *Petitioner* (3rd Respondent—3rd Defendant)*

v.

Sri A. V. Bhanoji Rao and others .. *Respondents (Petitioner and Respondents 1 and 2—1st Defendant, Plaintiff and 2nd Defendant).*

Civil Procedure Code (V of 1908), O. 23, r. 1—Suit decreed against defendant ex parte *and withdrawn against others—*Ex parte *decree set aside on technical ground—Effect on withdrawal against other defendants.*

In a suit for possession against (1) first defendant the plaintiff's vendor, (2) third defendant who claimed to have been in enjoyment of the property and (3) the second defendant a tenant of third defendant, the first defendant remained *ex parte* and return of purchase money was decreed against him and the suit was withdrawn as against the other defendants. The first defendant was able to get the *ex parte* decree set aside on a technical ground.

Plaintiff sought to proceed against all defendants.

Held, there is no provision in the Code whereby the withdrawal of a suit against a defendant can be cancelled. The only thing that can be done for the plaintiff is to grant permission under O. 23, r. 1 to file a fresh suit against the third defendant.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Vizagapatam dated 23rd December, 1938 and made in I. A. No. 248 of 1938 in O. S. No. 67 of 1937.

Y. Suryanarayana for Petitioner.

P. V. Rajamannar and *K. Subba Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff was a purchaser of an item of land from the first defendant and she seems to have had some

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* C. R. P. No. 1429 of 1939. 15th March, 1940.

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difficulty in obtaining possession of the property, which the third defendant claims as his by virtue of long possession. She brought a suit against the first defendant, her vendor, the third defendant, who claimed to have been in enjoyment of the property, and the second defendant, a tenant of the third defendant, for possession of the land and in the alternative for the return of the purchase money with damages.

The first defendant was declared *ex parte*. That meant that the plaintiff was able to obtain the return of the purchase money with which she would have been satisfied. She therefore reported to the Court that she did not press the suit against defendants 2 and 3, and the suit as against them was withdrawn. She obtained merely a decree against the first defendant for the purchase money and damages. Unfortunately for the plaintiff, the first defendant was able to get the *ex parte* decree set aside on a technical ground. As the first defendant might now be able to satisfy the Court that he had given her a valid title and the plaintiff would not be able to obtain possession from the third defendant because she had let the suit against him be dismissed, she was in danger of losing both the land and her money. In her counter to the first defendant's petition she therefore prayed that in case the petition of the first defendant were granted, the whole decree might be set aside and she be allowed to proceed against the other defendants also. The learned District Munsif of Vizagapatam thought that this was only just, and so he set aside the entire decree, restoring the suit to the condition in which it was when originally filed. The third defendant appeals on the ground that this order is illegal.

It is no doubt true—as the learned District Munsif felt—that it would be equitable and just to allow the plaintiff to proceed against the third defendant because her withdrawal of the suit against the second and the third defendants was only because the first defendant had been declared *ex parte*; but the question is whether the learned District Munsif had any power to do this. The relevant provisions of the Civil Procedure Code, are clearly worded and afford little support for the order of the learned District Munsif. O. 9, r. 13, which deals with the setting aside an *ex parte* decree, contains a provision which enables the Court in certain cases to set aside the decree against the other defendants also; but that can only be done where the decree is of such a nature that it cannot be set aside as against

such defendant only. There is no such difficulty in this case. Moreover, the decree cannot be said to be against the third defendant. On the contrary, it is in favour of the third defendant. O. 23, which deals with the withdrawal and adjustment of suits, does not make any provision for withdrawing a withdrawal; and so it would seem that there is no provision in the Code whereby the withdrawal of a suit against a defendant can be cancelled. The only thing that can now be done for the plaintiff is to grant her permission under O. 23, r. 1 to file a fresh suit against the third defendant.

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The petition is therefore allowed with regard to that part of the lower Court's order restoring the suit against defendants 2 and 3 and an order will be passed granting permission to the plaintiff to file a fresh suit against the second and third defendants if she so desires.

The first defendant has appeared in this Court through an advocate; but clearly the first defendant cannot be affected by the order of the lower Court or by any order that this Court might pass in revision. Under the circumstances of this case, there will be no order as to costs.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—THE HON'BLE MR. JUSTICE HORWILL.

Pappammal and others .. *Petitioners* (*Petitioners*).

v.

Seethammal and others .. *Repondents* (*Respondents 2 to 11.*)

Pappammal v. Seethammal.

Civil Procedure Code (V of 1908), O. 33, r. 1—Construction—Saleable interest in some items of suit property—Effect on right to sue as pauper.

The comma after the word "suit" separates the first part of the explanation to r. 1 from the second part; it follows that the expression "other than his necessary wearing apparel and the subject-matter of the suit" qualifies only the second part of the explanation and not the first.

Mulla's Civil Procedure Code commentaries, and *Mahalakshmi Ammal, In re*, (1925) 50 M.L.J. 114, relied on.

Ramaswami Naidu v. *Vaiyapuri Nadan*, (1934) 67 M.L.J. 581, referred to.

Where both sides agree that the plaintiff has a saleable interest in certain items of suit property, it would be contrary to the spirit of O. 33, if the plaintiff could ignore that property on which money could be raised for deciding a petition for leave to sue as a pauper.

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* C.R.P. No. 1460 of 1939. 15th March, 1940.

Pappammal
v.
Seethammal

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Tirumangalam dated 2nd August, 1939 and made in O. P. No. 24 of 1939.

K. V. Srinivasa Aiyer for Petitioners.

R. Desikan for Respondents.

The Court delivered the following

JUDGMENT.—The petitioners filed this suit for a declaration that the property left by first petitioner's deceased husband belonged to her and for an injunction restraining the first defendant, a co-widow, from interfering with her possession. The first defendant resisted the suit on the ground that the property was the self-acquired property of her husband and that he had left a will by which he bequeathed all the property with the exception of items 9 and 10 to the defendants. The first plaintiff replied that her husband was not then in a sound disposing state of mind and that the will was therefore not binding on her. The plaintiff paid such Court-fee as she thought sufficient; but during the course of the trial, the Court-Fee Examiner discovered that a higher Court-fee was payable. The plaintiff then declared that she was unable to pay that higher Court-Fee and prayed for permission to continue the suit *in forma pauperis.* That petition was dismissed by the District Munsif of Tirumangalam on the ground that whether on the plaintiff's case or on the defendants' case, the plaintiff had an interest in items 9 and 10 upon which she could raise the amount necessary for paying the additional Court-fee.

The first point that arises is whether items 9 and 10 can be said to be the subject-matter of the suit; and if so whether they are excluded by O. 33, r. 1, Civil Procedure Code, for the purpose of evaluating the property of the plaintiff. It seems to me that the comma after the word 'suit' separates the first part of the explanation to r. 1 from the second part; from which it would follow that the expression 'other than his necessary wearing apparel and the subject-matter of the suit' qualifies only the second part of the explanation and not the first. If this expression were intended to qualify the whole of the explanation, then the comma after 'suit' would be wrong. I am fortified in this opinion by the commentary in Mulla's 'Civil Procedure Code' and by the judgment of Jackson, J. in *Maha-*

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lakshmi Ammal in re[1], in which he follows *Krishna Bai* v. *Manohar*[2]. and disagrees with *Bai Balagauri* v. *Motilal Ghellabai*[3], in which, he says, the earlier Bombay decision had been overlooked. It is true that Madhavan Nair, J. in *Ramaswami Naidu* v. *Vaiyapuri Nadan*[4], seems to express an opposite opinion; but he did not consider the point which we are now discussing. All that he said was that

> "In the explanation to O. 33, r. 1, Civil Procedure Code the definition of 'pauper' is given from which it appears that in considering whether a person is a pauper, the subject-matter of the suit should be excluded".

So he did not consider the question whether the words 'other than his necessary wearing apparel and the subject-matter of the suit' qualify only a part of the explanation to r. 1 of O. 33 or the whole.

In a sense, the subject-matter of this suit may be considered as far as these two items are concerned to be the difference between half the widow's life-estate and the whole value of the property. Where both sides agree that the plaintiff has a saleable interest in these two items, it would be contrary to the spirit of O. 33 if the plaintiff could ignore this property on which she can undoubtedly raise money.

It is no doubt true that even if she has a saleable interest in items 9 and 10, she is entitled to continue the suit as a pauper unless the Court is satisfied that she can sell whatever interest she has in these items and raise sufficient money to pay the deficit Court-fee. With so much doubt as to what title she had in the lands and the existence of the question whether, if she had a widow's estate, a sale would bind the reversion, she would probably obtain very little for them in the open market. This difficulty has however been removed by the offer of the defendants to pay the plaintiff what she states to be the full value of the two items, namely, Rs. 350. The defendants are willing to take the risk of it being found by the Court that the plaintiff is not entitled to more than half the widow's estate in those items. They are also willing to bear the risk that some reversioner at some future time might succeed in having it declared in a Court of law that the alienation is not binding on him. There can therefore be no doubt that the plaintiff can

1. (1925) 50 M.L.J. 114.
2. (1906) 30 Bom. 593.
3. (1922) 47 Bom. 523.
4. (1934) 67 M.L.J. 581.

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raise money on items 9 and 10 to pay the deficit Court-fee of Rs. 171-6-0.

This revision Petition is therefore dismissed with costs. Two months from this day will be allowed to the plaintiffs for payment of the requisite Court-fee.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

The Public Prosecutor .. *Appellant**

v.

Mahommad Abdullah and another .. *Respondents (Accused 2 and 3).*

Public Prosecutor v. Mahommad Abdullah.

Indian Emigration Act (VII of 1922), S. 30 (3) read with S. 25 (2) (b)—*Assisting labourers to depart from British India—Gist of offence—Tests.*

Where the accused assisted some labourers (by obtaining tickets for them) to depart by land out of British India for the purpose of working for hire in a country beyond the sea,

Held, it is an offence made punishable under S. 30 (3) read with S. 25 (2) (*b*) of the Indian Emigration Act. The view that assistance means either financial assistance or entering into an agreement to work for hire is unwarranted.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondents (accused) by the Court of the Joint Magistrate of Negapatam in C.A. No. 1 of 1939 on his file (C.C. No. 395 of 1938 on the file of the Stationary Sub Magistrate of Negapatam).

The Public Prosecutor (V. L. Ethiraj) for the Crown.

T. R. Srinivasa Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal by the Provincial Government against the appellate order of acquittal of the respondents of an offence under S. 30 (3) read with S. 25 (2) (*b*) of the Indian Emigration Act.

The respondents were running a vidhuthi or rest house at Negapatam and as found by the Courts below, P. Ws. 1 to 5, the unskilled labourers who were bound for Penang and lodging in the vidhuthi were not permitted to embark at Negapatam. Their steamer fares were refunded and the respondents offered

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* Crl. Appeal No. 239 of 1939. 20th March. 1940.

to send them to Penang by a French steamer from Karaikal. P. Ws. 1 to 5 paid the required amount to the first respondent and he secured the steamer tickets and sent them to Karaikal with the second respondent. The second respondent saw them safely into the boats which took them to the steamer and as urged by the Public Prosecutor the respondents undoubtedly assisted P. Ws. 1 to 5 to depart by land out of British India so as to depart for the purpose of working for hire in a country beyond the sea which is made punishable under S. 30 (3) read with S. 25 (2) (*b*) of the Indian Emigration Act. The view of the Joint Magistrate that assistance means either financial assistance or entering into an agreement to work for hire is unwarranted and the order of acquittal is unsustainable.

The order of acquittal is therefore set aside and the respondents are convicted under S. 30 (3) read with S. 25 (2) (*b*) of the Emigration Act. The offence is serious and the respondents were sentenced to a fine of Rs. 100 each by the trial Court. They are therefore sentenced to a fine of Rs. 100 each with simple imprisonment for six weeks in default and one month is allowed for payment.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

P. L. N. S. P. Subramanian Chettiar .. *Appellant** (*Defendant*)

v.

R. M. P. L. L. Lakshmanan Chettiar (dead) and another.. *Respondents* (*Plaintiff and his L. R.*).

Will—Bequest to widow for her life and provision that after her death it should be enjoyed by daughter's son—Daughter's son predeceasing widow—Person entitled to estate.

A testator left the property to his widow for her life and made provision that after her death it should be enjoyed by his daughter's son. The daughter's son predeceased the widow who then mortgaged the property and subsequently sold the same.

Held, where there is a life estate given to a person, the remainder vests on the testator's death in the remainderman, unless there are very clear words to show that the testator had a contrary intention on the language used in the will. The daughter's son had a vested remainder which passed to his widow on his death.

* S. A. No. 523 of 1937. 26th February, 1940.

Subramanian Chettiar *v.* Lakshmanan Chettiar.

Second appeal against the decree of the Court of the Subordinate Judge of Sivaganga in A. S. No. 52 of 1935 preferred against the decree of the Court of the District Munsif of Manamadura in O. S. No. 215 of 1933.

T. L. Venkatarama Aiyar for Appellant.

A. C. Sampath Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—On the 26th October, 1900, one Subbayyar executed a registered will, Ex A. He left the property for her life to his widow Gomati and made provision that after her death it should be enjoyed by his daughter's son Ramaswami. Ramaswami predeceased Gomati and she, after Ramaswami's death, mortgaged the property to the second respondent. Later, she sold the same property to Muthukaruppan, he undertaking to discharge this mortgage. As he failed to do so, the second respondent filed a suit on his mortgage, impleading Muthukaruppan and his sons and the widow of Ramaswami. He obtained a decree; and in execution of his decree brought the property to sale and purchased it himself. In attempting to obtain possession of the property, he was resisted by the present appellant, who was then in possession and claimed a right to remain in possession as a purchaser from Subbayyar's heirs. The claim petition of the appellant was allowed, and so the mortgagee-purchaser was constrained to bring the present suit for a declaration of his rights and for possession. The main question that arose in this suit was whether, on a proper construction of the will, the widow of Ramaswami had any right in the property or whether the property reverted to Subbayyar's heirs after Gomati's death. Both Courts have held on an interpretation of the will that there was a vested remainder in Ramaswami and that the property after his death vested in his widow who, I have already said, was a party to the mortgage suit. They came to the conclusion that the appellant had no rights in the property and decreed the suit.

From a reading of the will there can be no doubt that the property was given to Gomati for her life and that after her it was to be enjoyed by Ramaswami. That does not however mean that the vesting in favour of Ramaswami was to be postponed until after the widow's death. In law it is presumed that where there is a life estate given to a person, the remainder vests on the testator's death in the remainderman, unless there

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are very clear words to show that the testator had a contrary intention. The language used in this will is what one would expect in a document written by a layman. The first clause therein is relied upon by the appellant as indicating that the vesting was to be postponed until after Gomati's death, and is to the effect that:

"The expenses of my (testator's) obsequies, etc., shall be met by the said Gomati and the expenses of her obsequies, etc., by the said Ramaswami. . . . ."

This only shows that the testator expected his grandson would survive his widow; and this direction to his grandson that he should meet the funeral expenses of the step-grandmother should not be read as a qualification of the earlier paragraphs which conferred on Ramaswami a vested interest upon the testator's death. As was pointed out by Madhavan Nair, J., in *Narayana* v. *Subbaraya*[1], the mere fact that the testator made no provision for the performing of the funeral obsequies of the widow in case the remainderman should fail to do it, is itself an indication that the testator did not intend that the remainderman's rights should be contingent on his surviving the widow. *Periyanayaki Ammal* v. *Rathnavelu Mudaliar*[2] has been quoted as a case on the other side of the line in which it was held that there was a contingent remainder and not a vested remainder; but the wording was there different. I have no doubt that the lower Courts were right in their interpretation of the will and that Ramaswami had a vested remainder which passed to his widow on his death.

The next argument of the learned advocate for the appellant is this: he points out that it was Gomati and not Ramaswami who mortgaged this property to the plaintiff and that unless the Court finds that this alienation was binding on Ramaswami and his heirs, the plaintiff would have acquired no right under the mortgage. The answer to that is that Ramaswami's widow was a party to the mortgage suit and it was against the mortgaged property that the plaintiff obtained a decree. Ramaswami's widow was therefore bound by the result of that suit and the mortgage must be held to be binding on her. It is argued that the Court may have held that any question of her paramount title to the property and of the binding nature of this mortgage was foreign to the mortgage suit and that all that was to be sold was the right, title, and

1. A.I R. 1929 Mad. 32. 2. (1924) 47 M.L.J. 310.

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interest of Gomati in the suit property. That, however, could not have been the case; for at the time of the mortgage suit, Gomati was dead and that was why Ramaswami's widow was impleaded. So I have no doubt, in the absence of cogent reasons to the contrary, that the mortgage decree and therefore the sale of the suit property was binding on the person whom we now find to have been the owner of the property. The plaintiff is therefore entitled to succeed against the appellant, who has no title in the property at all. The appeal therefore fails and is dismissed with costs.

K. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE ABDUR RAHMAN.

Sree Rajah Vasireddi Balachandrasekhara Varaprasad Bahadur Manne Sultan Garu .. *Appellant** *(Plaintiff)*

v.

Mallela Lakshminarasimham and others .. *Respondents (Defendants).*

Vasireddi Balachandrasekhara Varaprasad Bahadur v. Lakshminarasimham.

Hindu Law—Alienation by father having one son in existence—Subsequently born son—Whether entitled to question alienation—Share to which alienee entitled.

Where a Hindu father having only one son mortgaged joint family property for a purpose not binding on the family and another son is subsequently born to him, in a suit by the mortgagee on the mortgage after the birth of the second son against the father and both the sons, the mortgagee is entitled to a mortgage decree in the suit in respect of a half share of the property which belonged to the father at the date of the mortgage and not merely in respect of an one third share.

Chinnu Pillai v. *Kalimuthu Chetti,* (1911) 21 M.L.J. 246: I.L.R. 35 Mad. 47 (F.B.), followed.

A son born after an alienation of the joint family property by the father cannot question the alienation, even though there were other members of the joint family at the date of the alienation who had not consented and validated the alienation.

Lal Bahadur v. *Ambika Prasad,* (1925) L.R. 52 I.A. 433: I.L.R. 47 All. 795 (P.C.), followed.

The statement of the law in Mayne's Hindu Law, (10th Edition) pp. 511 and 512, not approved.

Chandramani Prushti v. *Jambeswara Rayagaru,* (1930) 34 L.W. 598 on this point not followed.

Case-law reviewed.

* Appeal No. 8 of 1937 and C.M. Ps. Nos. 484 and 500 of 1940. 28th February, 1940.

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Appeal against the decree of the District Court of Kistna dated the 31st October, 1936 and passed in O.S. No. 15 of 1936 and petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to scale down the decree-debt in O.S. No. 15 of 1936 on the file of the District Court of Kistna, now under appeal in the above Appeal No. 8 of 1937 and pass such other orders as this Court may deem fit, etc.

V. Govindarajachari and *K. Krishnamurthi* for Appellant.

A. Venkatachalam, P. Somasundaram and *P. Suryanarayana* for Respondents.

The judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.—This is an appeal from the judgment and decree of the learned District Judge of Kistna in a suit upon a mortgage dated 19th September, 1929, executed by the first defendant for himself and as guardian of his son, the second defendant in favour of the plaintiff. The third defendant is another son of the first defendant born subsequent to the date of the mortgage. The mortgage was for a sum of Rs. 2,500 payable with compound interest at Re. 0-14-6 per cent. per month. The plaint alleged that there was a payment of Rs. 600 on 9th November, 1930 and that the said payment was made by one Kasibotla Suryanarayanamurti on behalf of the defendants. The defendants denied that the said sum of Rs. 600 was paid as alleged in the plaint and the first defendant pleaded that he was not personally liable on the ground that the personal remedy was barred by limitation, the suit having been instituted on 16th March, 1936, more than six years from the date of the mortgage. Defendants 2 and 3 denied the truth and validity of the mortgage. Their case was that the amount was not borrowed for any family necessity or for payment of any antecedent debt but for conducting a business newly started by the first defendant himself. Another point taken was that even assuming the mortgage to be true, it was binding only on the mortgagor's share which must be deemed to be one-third and the third defendant though born subsequent to the date of the mortgage would be entitled also to a third share in the property mortgaged. The learned District Judge found the mortgage to be true but held that it was not binding on defendants 2 and 3 on the ground that the amount borrowed was for the purpose of a business started by the father and not for any antecedent debt

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or family necessity. He also found that Rs. 600 was paid by the said Suryanarayanamurti but he was not an agent duly authorized within the meaning of S. 20 of the Limitation Act and therefore the said payment would not save the bar of limitation in respect of the personal liability of the first defendant. He therefore held that the first defendant was not personally liable for the debt. In regard to the interest of the first defendant in the property he held that he was entitled to half a share in the suit property and that the third defendant cannot repudiate the alienation made before his birth. The plaintiff has preferred this appeal in so far as the decree is against him, that is, in so far as it negatived the personal liability of the first defendant. Defendants 2 and 3 have preferred a memorandum of objections raising the contention that the lower Court should have passed a decree only for a third share of the property and not for a half share.

Two questions therefore fall to be decided, namely, (1) whether the first defendant is personally liable for the debt and (2) what is the share of the first defendant in the property mortgaged which the plaintiff is entitled to sell in execution of the decree in his favour. The first question turns on the determination of the issue whether the payment of Rs. 600 operates as an acknowledgment of debt within the meaning of S. 20 of the Limitation Act. The payment of Rs. 600 was apparently made towards the principal and was so treated by the plaintiff. In order that a part payment of a principal can be relied on for saving the bar of limitation within the meaning of S. 20 of the Limitation Act, it must fulfil three requisites: (1) the payment must be made by the debtor or his agent; (2) the agent must have been empowered specifically to make the said payment; and (3) there must be an acknowledgment of the said payment in the handwriting of or in a writing signed by the debtor or his agent, that is, if the payment was made by the debtor, in the handwriting of or in a writing signed by the debtor or if the payment was made by the agent, in the handwriting of or in a writing signed by the agent. The question is whether the view of the learned District Judge that K. Suryanarayanamurthi (P.W. 4) in making the payment was not the duly authorized agent of the defendants within the meaning of S. 20 is correct. P.W. 4 admits that he paid Rs. 600 in part payment of the debt. He acknowledges the fact of payment in

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a letter Ex. B signed by him and delivered to the plaintiff, which runs thus:—

"Irusalnamah submitted by Kasibotla Ramayya Garu's son Suryanarayanamurti, resident of Challapalli, Divi Taluq:

Out of the amount due under the hypothecation deed executed on 19th September, 1929, in your favour by Mallela Venkatapayya Garu's adopted son Lakshmi Narasimham, resident of Godugupeta, Bandar, a sum of Rs. 600 (in words, six hundred) has been sent to me to be credited towards the said deed and so I have sent the same to you. I shall get the said amount credited towards the said deed by the said Lakshmi Narasimham.

(Sd.) Kasibotla Suryanarayanamurti,
9th November, 1930."

Mr. Somasundaram on behalf of the defendants 2 and 3 does not dispute the fact of payment but contends that P.W. 4 was not an agent within the meaning of the section but only a mere messenger who made the payment and that Ex. B therefore cannot save limitation. On the evidence on record we are clearly of the opinion that P.W. 4 in making the payment was the duly authorized agent of the defendants within the meaning of the section. P.W. 4 is a close relation of the first defendant. It was P.W. 4 that arranged for the loan. Ex. B clearly says that the sum of Rs. 600 was sent to him for the express purpose of making the payment on his behalf and crediting the same towards the deed. No doubt P. W. 4 says in his evidence before the Court that the money was not sent by the first defendant but he had the money belonging to one Venkata Ramanamma and inasmuch as the plaintiff pressed for the payment of the debt he paid the same on behalf of the first defendant. This story cannot possibly be believed in the face of the express recital in Ex. B. P.W. 4 says that he told the first defendant that he made the payment of a sum of Rs. 600 to the plaintiff and that first defendant told him that he would settle later. Though the first defendant as D.W. 1 denies P.W. 4 having told him that such a payment was made, we cannot accept this denial as true. Four months before the plaintiff filed the suit the plaintiff sent a registered letter Ex. D, dated 3rd March, 1936 to the first defendant wherein the fact of payment of Rs. 600 on his behalf by Suryanarayanamurti was mentioned and no reply was sent thereto. Therefore the recital in Ex. B that Rs. 600 was sent by the first defendant must be true and there is no reason to think that P.W. 4 was making a false recital. It is very likely that that sum was sent to P.W. 4 as he was the person who arranged for the loan.

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The decision in *Ramkumar Sewchand Roy* v. *Nanuram Poddar*[1], on which Mr. Somasundaram relies does not support him; on the other hand, as in this case, the payment was made by a friend of the debtor acting as his agent but he did not actually pay the money to the creditor but sent it through a messenger with a letter which was similar in terms to Ex. B. It was held that that was a valid acknowledgment within the meaning of S. 20 of the Limitation Act.

The next question is whether the decree of the learned District Judge directing a sale of a half share of the first defendant is right. The contention of Mr. Somasundaram is that an after-born son is entitled to question the alienation made by a father without any legal necessity when on the date of the alienation there were other sons living who could object to the said alienation and as in this case, on the date of the alienation the second defendant was born and in existence, it therefore follows from this that the 3rd defendant would be entitled to a third share and what would pass to the alienee would only be a third share of the father and therefore the decree ought to have directed only a sale of the one-third share of the father in the property mortgaged. In support of his contention Mr. Somasundaram relies on the decisions reported in *Amirthalinga Thevan* v. *Arumuga Ambalagaran*[2], *Chandramani Prushti* v. *Jambeswara Rayagaru*[3], *Muthukumara Sthapathiar* v. *Sivanarayana Pillai*[4]. Though in *Chandramani Prushti* v. *Jambeswara Rayagaru*[3], it is stated as settled law that if a son was born after the alienation of the family property by his father, if there were other members who had not consented to and validated the alienation, it can be questioned by an after-born son, the proposition would seem to require reconsideration in view of the decision of the Privy Council in *Lal Bahadur* v. *Ambika Prasad*[5]. The learned Editor of Mayne's book on Hindu Law comments on that decision in pages 511 and 512 thus:

"An observation of the Privy Council in *Lal Bahadur* v. *Ambika Prasad*[5], would seem to confine the right to challenge alienations of family property to the coparceners alive at the date of the alienation and to deny such a right to a coparcener who though born subsequent to the alienation acquires

1. (1925) I.L R. 53 Cal 163. 2. (1928) 28 L.W. 634.
3. (1930) 34 L.W. 598.
4. (1931) 64 M.L.J. 66: I.L.R. 56 Mad. 534.
5. (1925) I.L.R. 47 All. 795: L.R. 52 I.A. 433 (P.C.).

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an interest in the coparcenery property before the death of the objecting or non-alienating coparceners."

"The point was not considered and it may not be right to regard the observation as a decision on the question. It would be against the whole current of Indian authorities which were neither referred to nor considered and cannot therefore be deemed to be overruled. If however the observation means that coparceners born in the family subsequent to an alienation before the death of the other coparceners who could challenge it, have no right to the property and consequently no right to challenge the alienation, it, would conflict with what was said by the Board in *Ramkrishore Kedarnath* v. *Jainarayan*[1], as well as with the cardinal principle of Hindu Law."

With great respect to the learned Editor we are not inclined to agree with these remarks. We are inclined to think that the decision of the Privy Council is a direct decision on the question. In that case the facts were as follows: Ram Din and his brother Pateshwari were two brothers. On 6th August 1895, as managers of the family they mortgaged certain family property. They executed two mortgages, one simple and the other usufructuary. On the date of the mortgage Ram Din had two sons Awadh Behari and Jantri Prasad, both of them minors. Long subsequent to the date of the mortgages the plaintiffs were born to Awadh Behari. On 12th September, 1904, Pateshwari and Ram Din sold the property to the usufructuary mortgagee in part satisfaction of his mortgage and for cash received for payment of the other debts. The suit was brought in 1919 to set aside the sale when the plaintiff's father was alive and his right to set it aside was barred by limitation. Dealing with the right of the plaintiffs to question the mortgages their Lordships observed as follows:

"The respondents, plaintiffs in the suit, are sons of Awadh Behari. In 1895 they were still unborn. This, as will later appear, is one of the most important facts in the case. *It follows from it that these two mortgage deeds have always been binding on the respondents.* The only joint family estate to an interest in which they succeeded was an estate which to the extent of these two mortgages had already been alienated."

These observations of their Lordships seem to be clear and there seems to be no ambiguity about them. If the matter had rested there, one might have said that they were in the nature of an obiter. The learned Judicial Commissioner of Oudh has rested his decision on the ground that on the date of the sale the mortgages must be deemed to be antecedent debts and therefore the sale was justified. But their Lordships were not inclined to rest their decision on this ground but expressly put it on the

4. (1913) 25 M.L.J. 512: L.R. 40 I.A. 213: I.L.R. 40 Cal. 966 (P.C.).

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ground that the plaintiffs were not born on the date of the mortgage. This is how they deal with the question at page 801:

"The effect of that explanation (the explanation of Sahu Ram's case in the case of *Brij Narain* v. *Mangal Prasad*[1],) in their Lordships' judgment is to show that in the circumstances of this case both of the mortgages of 1895 were 'antecedent debts' which would justify for their liquidation a sale of family property not otherwise improper. In the present case, however, it is not in their Lordships' judgment, necessary to invoke any such doctrine in order to counter the objection to the sale now being dealt with. *Both mortgages, as their Lordships observe once more, were binding upon the respondents.* A sale of family property otherwise unobjectionable, which resulted in the removal, from what remained of it of the burden *pro tanto* of these encumbrances, *cannot be successfully attacked by those so bound.*"

This decision is therefore a direct decision on the question whether an after-born son is entitled to impeach an alienation made before his birth. And the case in *Ramkishore Kedarnath* v. *Jainarayan*[2], does not enunciate any principle in conflict with this decision. In that case the facts were as follows: The plaintiffs were the four sons of one Kedarnath, who in October, 1898, made a disposition of a part of the family property by way of partition to Jainarayan who was alleged to be an adopted son of his undivided brother's widow. The suit was instituted on 20th December, 1907, to set aside the said alienation. The first plaintiff was born on 20th December, 1886. The other plaintiffs were born between 1892 and 1894. The learned Judicial Commissioner held that as the first plaintiff instituted the suit within three years of attaining the age of 21, he was entitled to the benefit of S. 7 of the Limitation Act of 1877 and the suit was not barred as against him, but he held that it was barred as against his younger brothers, who were born after the commencement of what he regarded as the adverse possession of the defendant Jainarayan. Their Lordships dispose of the correctness of this view thus:

"It was however conceded before this Board, and, as their Lordships think, rightly conceded, that if the first plaintiff succeeds in the suit his younger brothers born before a partition of the estate will be entitled to share in the relief."

This does not lend countenance to the view that the younger sons are entitled to impeach the alienation. What was meant by their Lordships was that if the elder son recovers the estate the younger son would be entitled to share in it being joint

1. (1923) 46 M.L.J. 23: L.R. 51 I.A. 129: I.L.R. 46 All. 95 (P. C.).
2. (1913) 25 M.L.J. 512: L.R. 40 I.A. 213: I.L.R. 40 Cal. 966 (P.C.).

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family property recovered for the family. Apparently in *Viswes-wara Rao* v. *Surya Rao*[1], their Lordships Madhavan Nair and Stone, JJ., were not inclined to agree with the view expressed in *Chandramani Prushti* v. *Jambeswara Raya Garu*[2], as settled law—*vide* observations at page 687, because in that page the learned Judges after a review of the case-law remarked thus:

"Whether or not an afterborn son can effectively join with existing sons to attack or resist an alienation, the cause of action or the right to defend is a cause or right that was in those members of the family that were alive at the time of the alienation and were not consenting."

They express an opinion that if before the after-born son is born, the sons in existence were to die, the right is lost to the after-born son though the right to set aside an alienation may be within the time from the date when the cause of action accrued to the sons in existence. This seems to be in conflict with the view expressed in Mayne's book at page 513 where it is stated that it is a right in every member of coparcenery for the time being and as long as that right in the coparcenery exists it would be immaterial whether he was alive on the date of the alienation or born subsequently. Much may be said in favour of either view and it may be that the view expressed in Mayne's book is sounder. The scope and effect of the Privy Council decision in *Lal Bahadur* v. *Ambika Prasad*[3], may require consideration. But we think that in the view we are taking of the share which the father is entitled to, it is not necessary to decide the point. The question to what share he is entitled is quite distinct from the question whether an after-born son is entitled to question the alienation or not. We will assume he can and deal with the question of the father's share on that footing. So far as our Presidency is concerned, it is accepted law that a coparcener is entitled to alienate his share for value. What the alienee gets by virtue of such an alienation is not a bare right to partition but a vested interest, the extent of which will have to be ascertained by a suit for partition. The Full Bench decision of our High Court in *Chinnu Pillai* v. *Kalimuthu Chetti*[4], has ruled that the interest which an alienee would get would be the share to which the alienor would be entitled at the time of the alienation undiminshed by any births or deaths in

1. (1935) 70 M.L.J. 360: I.L.R. 59 Mad. 667.
2. (1930) 34 L.W. 598.
3. (1925) L.R. 52 I.A. 433: I.L.R. 47 All. 795 (P.C.).
4. (1911) 21 M.L.J. 246: I.L.R. 35 Mad. 47 (F.B.).

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the family subsequent to the date of the alienation. The rule is thus stated by White, C. J., in delivering the judgment of the Full Bench:

"As pointed out by the Privy Council in *Suraj Bunsi Koer* v. *Sheo Prasad Singh*[1], an alienation by a coparcener of his joint interest in family property is inconsistent with the strict theory of a joint and undivided Hindu family. But the doctrine recognising this right is well established in this Presidency, and it seems to me to be only the logical development of this doctrine that, for the purpose of ascertaining the quantum of interest, alienated, the test to apply should be the state of the family as regards the number of coparceners, at the time the alienation is made, and not the state of the family when the owner of the interest seeks to reduce his interest into possession."

The learned Judges in *Chinnu Pillai* v. *Kalimuthu Chetti*[2], expressly dissented from the decision of the Full Bench in *Rangaswami* v. *Krishnayyan*[3], which took the view that the interest of the alienor would be diminished by births of subsequent members of the family. They in effect followed the view expressed by Bhashyam Ayyangar, J., in *Ayyagiri Venkataramayya* v. *Ayyagiri Ramayya*[4], where the learned Judge took the view that the matter was concluded by the decisions of the Privy Council. The learned Judge at p. 718 observes as follows:—

"A coparcener may profess to alienate either his undivided share in the whole of the family property or his undivided share in some specified portion of the family property....or the whole of a specified portion of the family property .... The same thing may take place in the case of involuntary sales also. In all these cases the sale operates upon the interest and share of the transferor as the same existed at the date of the transfer and the transferee must work out the transfer by bringing a suit for ascertaining what the share and interest of the transferor was at the date of the transfer .... When the transfer is of an undivided interest in the whole of the family property, the transferee will get whatever may be allotted to the transferor's share in a suit for partition. But if the transfer relates to any specified portion of the family property, there is the risk that it may turn out that in a partition of the whole property it is impracticable or inequitable to allocate either the whole or a part of such specified portion to the share of the transferor."

In giving expression to this view His Lordship was only following the decision of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Prasad Singh*[1]. In that case the mortgage was executed by the father Adit Sahai and on the date of the mortgage he was entitled to a third share. The question was what passed

1. (1879) L.R. 6 I.A. 88: I.L.R. 5 Cal. 148 (P.C.).
2. (1911) 21 M.L.J 246: I.L.R. 35 Mad. 47 (F.B.).
3. (1891) 1 M.L.J. 603: I.L.R. 14 Mad. 408 (F.B.).
4. (1902) I.L.R. 25 Mad. 690 (F.B.).

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to the purchaser at the execution sale. In dealing with this contention their Lordships of the Judicial Committee observed thus:

"On the other hand, if the law of the Presidency of Fort William were identical with that of Madras, the mortgage executed by Adit Sahai in his lifetime as a security for the debt, might operate after his death as a valid charge upon Mouza Bussumbhurpore to the extent of his own then share."

In the present case at the date of the alienation the father was entitled to a half share in the joint family property and that interest which was vested in him would pass to the mortgagee. The property which has been effectively carried away from the family was only a half and the other half would still be the joint family property and it is only in that half and in the equity of redemption in the other half, the alienation being a mortgage, the after-born son would be entitled to participate with the other son. This is in strict consonance with the principles of Hindu Law that in a Mitakshara family a member acquires right by birth only in the property which was then in existence and not in the property which has been effectively carried away from the family. In so far as the alienation of the father's interest is concerned, it must be deemed to have been effectively carried away because he is entitled to alienate it for value. If the view indicated in *Chinnu Pillai* v. *Kalimuthu Chetti*[1], namely, that the alienee gets the interest which the father was entitled to on the date of the alienation is to be followed, the view taken by the learned District Judge in this case that the father was entitled to a half share and the mortgagee is entitled to sell that share in execution of his decree is correct. There is only one reported decision which directly deals with this matter and that is a decision of our learned brother—Pandrang Row, J., reported in *Kasi Visweswara Rao* v. *Varahanarasimham*[2]. In that case the father sold the property in 1919. On that date there was only one son in existence and subsequently two sons were born. The alienation was not found to be such as to be binding on the sons. On the date of suit there were the father and three sons. The question was to what share the alienee would be entitled. The learned Subordinate Judge in that case following *Sthapathiar* v. *Sivanarayana Pillai*[3], held that the father would only be entitled to a

1. (1911) 21 M.L.J. 246: I.L.R. 35 Mad. 47 (F.B.).
2. A.I.R. 1937 Mad. 631.
3. (1932) 64 M.L.J. 66: I.L.R. 56 Mad. 534.

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fourth and the alienee would only get a fourth share. Pandrang Row, J., following *Chinnu Pillai* v. *Kalimuthu Chetti*[1], held that the share which the father would get would be the share which he would be entitled to on the date of the alienation which would be half and therefore he gave a decree for a half a share. The learned Judge declined to follow *Sthapathiar* v. *Sivanarayana Pillai*[2], and if we may say so with respect, rightly. The Full Bench in *Chinnu Pillai* v. *Kalimuthu Chetti*[1] case was constituted for the express purpose of considering the view expressed in *Rangaswami* v. *Krishnayyan*[3], that the share of the alienee should be determined not on the date of the alienation but on the date of suit and if subsequent to the date of alienation more members were born the alienee would get a reduced share. At the time when the Full Bench was constituted and the question was discussed, there were five Judges but at the time when the judgment was about to be delivered one of them ceased to be a judge of the High Court and the Full Bench was reconstituted with four Judges and the judgment was delivered dissenting from the said view in *Rangaswami* v. *Krishnayyan*[3]. The judgment was delivered in 1912 and so far as we know it was accepted as sound law both by the Bench and the Bar and followed till Jackson, J. struck a dissenting note in *Sthapathiar* v. *Sivanarayana Pillai*[2], and declined to follow the view expressed in *Chinnu Pillai* v. *Kalimuthu Chetti*[1]. Our own view is that the view expressed in *Chinnu Pillai* v. *Kalimuthu Chetti*[1] is the sounder view. In *Amirthalinga Thevan* v. *Arumuga Ambalagaran*[4], though the question was not discussed it was the view that was taken in *Chinnu Pillai* v. *Kalimuthu Chetti*[1] that was followed. This is clear from the following observations of Tiruvenkatachari, J. in that case at page 640:

> "The only remaining point to be considered is whether the 6th defendant who was born after the alienation has any and if so what right in the plaint properties which would entitle him to contest the suit. Under the sale deed Exhibit A the plaintiff acquired only the one-third share of the father Mari Ambalagaran in the joint family properties. The remaining interest therein appertained to the joint family of the alienor; and it so remained at the date of the 6th defendant's birth with the result that he also acquired an interest in it by his birth."

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1. (1911) 21 M.L.J. 246: I.L.R. 35 Mad. 47 (F.B.).
2. (1932) 64 M.L.J. 66: I.L.R. 56 Mad. 534.
3. (1891) 1 M.L J. 603: I.L.R. 14 Mad. 408 (F.B.).
4. (1928) 28 L.W. 634.

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The view that the father's share was a third and it is only in the remaining interest, that is, in the two-thirds, the after-born son the 6th defendant could be held to have acquired an interest by birth is in strict conformity with the view expressed in *Chinnu Pillai* v. *Kalimuthu Chetti*[1]. In *Chandramani Prushti* v. *Jambeswara Rayagaru*[2], the question of share was not considered at all. We are therefore of the opinion that the decree of the learned District Judge in directing a sale of a half share of the father is correct.

In the result we modify the decree of the learned Distriet Judge by declaring that the father is personally liable to pay any balance that might remain after the sale of his interest in the mortgaged property and the plaintiff will be entitled to apply for a decree for the said balance against the father personally and against the joint family properties in the hands of defendants 1 to 3. The appellant will have half the costs of the appeal but there will be no costs in the memorandum of objections.

Two applications (C.M.P. Nos. 500 and 484 of 1940) have been put in under the Madras Agriculturists Debt Relief Act IV of 1938, one by Mr. A. Venkatachalam on behalf of the first respondent and the other by Mr. Somasundaram on behalf of respondents 2 and 3. The plaintiff will have leave to file a counter-affidavit objecting to the reliefs sought in the said petitions. We direct these applications to be sent to the lower Court for adjudication on the merits. The decree that we pass herein will be subject to any relief which the applicants may get in those petitions.

K. S. — *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Arumilli Surayya .. *Appellant** (*3rd Defendant*).

v.

Pinisetti Venkataramanamma and others .. *Respondents* (*Plaintiff and defendants 1 and 2*).

Surayya *v.* Venkataramanamma

Transfer of Property Act (IV of 1882), S. 100—Sale by Court auction—Purchaser for value without notice of previous charge—Sale whether subject to equities.

1. (1911) 21 M.L.J. 246: I.L.R. 35 Mad. 47 (F.B.).
2. (1930) 34 L.W. 598.

*S.A. No. 1116 of 1936. 12th December, 1939.

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On the question whether a Court sale by a mortgagee without notice would be subject to a prior charge,

Held, that S. 100 of the Transfer of Property Act will not apply to such a case because of three reasons:

(*a*) S. 2 (*d*) of the Transfer of Property Act says that the Act does not apply to cases of transfer by operation of law save in certain circumstances.

(*b*) S. 5 of the Act clearly points out that a transfer does not include an auction sale and

(*c*) that whenever anything is sold by Court sale the auction purchaser is in no better position than the judgment-debtor himself and subject therefore to the same equities as the judgment-debtor.

A private sale without notice is not subject to equities at all.

Creet v. *Ganga Ram Gool Raj*, I,L.R. (1937) 1 Cal. 203 followed.

Halsbury's Laws of England. Vol. 13, p. 95, para. 87, relied on.

Appeal against the decree of the Court of the Subordinate Judge of Amalapuram in A.S. No. 50 of 1935 preferred against the decree of the Court of the District Munsif of Razole in O. S. No. 377 of 1932.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Appellant.

V. Parthasarathy for Respondents.

The Court delivered the following

JUDGMENT:—The plaintiff brought this suit for maintenance and sought to enforce it against the suit property over which she had a charge. The appellant was impleaded because he was in possession, he having purchased the property in a suit for sale brought by himself on a mortgage. He filed in the trial Court on the ground that he was not a *bona fide* purchaser with notice and he preferred an appeal which was dismissed on the ground that even if he did not have notice of the charge, his right would be subject to it because the charge was prior to the sale.

The question whether a sale without notice would be subject to a prior charge is not free from doubt. As the law stands at present, S. 100 of the Transfer of Property Act makes it clear that no charge shall be enforced against any property in the hands of a purchaser to whom such property has been transferred for consideration and without notice of the charge; but the charge in the present case was prior to the amendment of S. 100, which introduced the clause above quoted. The learned Subordinate Judge relied on a decision of Sadasiva Ayyar and Spencer, JJ., in *Srinivasa Raghava Aiyangar* v.

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Ranganatha Aiyangar[1]; but that case can be distinguished, in that Sadasiva Aiyar, J., was of opinion that the document then under consideration was something more than a mere charge and amounted to an anomalous mortgage. *Mollaya Padayachi* v. *Krishnaswami Iyer*[2], the other case relied on by the learned Subordinate Judge, contains a reference to the decision in *Srinivasa Raghava Aiyangar* v. *Ranganatha Aiyangar*[1], but there was no discussion of it as it seemed to be unnecessary for the decision of that case. Even *Aravamudhu Ayyangar* v. *Zamindarini Srimathi Abhiramavalli Ayah*[3], relied on by the learned advocate for the appellant, does not really discuss this point. However, *Indra Narain* v. *Mohammad Ismail*[4], which has been quoted in another connection, says that S. 100 of the Transfer of Property Act has retrospective effect. If that is so, then there would be no doubt that a purchaser without notice would not be bound by a prior charge.

The appellant however did not come into possession by means of a private sale, but by purchasing in Court auction the property which was subject to his own mortgage. In a similar case reported in *Indra Narain* v. *Mohammad Ismail*[4], it was held that S. 100 of the Transfer of Property Act does not apply to auction sales. Two reasons were given. S. 2 (*d*) of the Transfer of Property Act says that the Act does not apply to cases of transfer by operation of law, save in certain cases with which we are not here concerned. The second reason is that having regard to the definition of 'transfer' in S. 5 of the Transfer of Property Act, it is clear that a transfer within the meaning of the Act does not include an auction sale; for a transfer is defined as an act by which a living person conveys property to one or more other living persons. Property that passes to an auction purchaser is not conveyed to him by the judgment-debtor. Both these reasons seem valid. There is another reason for not applying S. 100, *viz.*, that what is sold in a Court sale is the right, title and interest of the judgment-debtor; so that the auction purchaser is in no better position than the judgment-debtor himself, and he is therefore subject to the same equities as the judgment-debtor was. In a private sale without notice, on the other hand, the purchaser is not subject to equities at all. *Creet* v. *Ganga Ram Gool Raj*[5], says:

1. (1918) 36 M.L.J. 618.
2. (1924) 47 M.L.J. 622 at 639.
3. (1933) 66 M.L.J. 566.
4. 1939 A.L.J. 849.
5. I.L.R. (1937) 1 Cal. 203.

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"The postion of a purchaser at an execution sale is the same as that of a judgment-debtor; his position is somewhat different from that of a purchaser at a private treaty. Execution purchasers purchase subject to all the charges and incumbrances—legal and equitable—which would bind the debtors."

This principle has been laid down in Halsbury's Laws of England Vol. 13, page 95, paragraph 87, where it is said:

Ordinarily, an assignee takes subject to all equities to which the assignor was subject; and this is the case where the assignee is a volunteer, and also where he is a purchaser for value if he has notice of the circumstances which raise the equity. But if he is a purchaser for value without notice, the equity cannot be asserted against him. Trustees in bankruptcy and judgment or execution creditors take only what was vested in the bankrupt or debtor; hence they do not rank as purchasers, but take subject to prior equities."

The learned advocate for the appellant argues that if he cannot rely on his sale, he can fall back on his mortgage. I doubt whether he can; but even if he could, S. 100 would not help him, for the proviso says:

"No charge shall be enforced against any property *in the hands of a person* to whom such property has been transferred for consideration and without notice of the charge."

If the appellant is treated as a simple mortgagee, he cannot by any stretch of the imagination be considered to have the property in his hands.

The appeal therefore fails and is dismissed with costs.

K. C. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD THANKERTON, LORD ROMER, SIR GEORGE LOWNDES, SIR GEORGE RANKIN AND MR. M. R. JAYAKAR.

Gadadhur Mullick and others .. *Appellants**

v.

The Official Trustee of Bengal, and others .. *Respondents.*

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——
Gadadhur
Mullick
v.
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Trustee of
Bengal.

Hindu law—Will—Bequest to existing person on happening of uncertain event not to take effect immediately on testator's death—Whether prior estate necessary to support conditional future gift—Gift over to trusts—Estate in the possession of reversioner—Suit by trustees against reversioner—Limitation Act, S. 10, if applies.

A Hindu died leaving by his will made in 1866 half of his residuary estate to his only son and the other half to the male issue if any, of his son in equal shares, but, if that issue should die without male issue under the age of sixteen years then to a certain trust fund. The son had no issue at the date of the will and ultimately died intestate in 1873 without male issue, leaving a widow and a daughter. His co-executor under the will continued to act until 1880 when he formally made over the whole estate to the

P. C. Appeal No. 4 of 1939. 16th January, 1940.
Bengal Appeal No. 72 of 1937.

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widow. She remained in possession of the whole estate until her death in 1932 her right to the abovementioned half of the residuary estate remaining unchallenged until 1934 when an action claiming the property was brought on behalf of the trust fund.

Held, (1) that the future gift to the trust fund given by the will was valid notwithstanding that the estate so granted was not limited to take effect on the determination of a prior estate granted by the will.

Soorjemoney Dossee v. *Denobhundoo Mullick*, (1862) 9 M.I.A. 123 and *Tagore* v. *Tagore*, (1872) L.R.I.A. Supp. 47, discussed and explained.

(2) That the action was prevented by the operation of S. 10 of the Limitation Act, 1908, from being barred inasmuch as the testator's son and his co-executor were under a duty to preserve that part of the residuary estate which formed the subject of the future gift to the trust fund and were therefore in the position of trustees.

Appeal from a decree of the High Court, Fort William in Bengal in its Civil Appellate Jurisdiction dated 6th April, 1938 (Costello and Panckridge, JJ.) affirming a decree dated 28th June, 1937 of that Court in its Original Civil Jurisdiction (Ameer Ali, J.)

The facts are fully set out in the judgment,

L. P. E. Pugh, K. C. and *J. M. Parikh* for appellants.—It is submitted that this will runs counter to a vital principle of Hindu law. The Roopchand Dhur Trust could not receive the second half of the testator's residuary estate until his son Rishikesh has died and then only on the happening of uncertain events. There are lacking, therefore the delivery and acceptance which are essential to the completion at Hindu law of a gift whether made *inter vivos* or by will. At the time of the testator's death, there was under the will no one available to take the property bequeathed. The gift therefore failed and the property passed to the heir-at-law—Rishikesh as on intestacy. The estate having once passed to him he could not be divested of it save by a posthumous or an adopted son. While there may be a valid gift over, both the person who takes the absolute or life estate in the first place subject to a divesting clause, and the person who is to take ultimately must be living at the time of the testator's death. See *Bai Motivahoo* v. *Bai Mamoobai*[1], where it was said that it appeared to the Board "to follow from the first taker being allowed to have only a life interest that his possession is sufficient to complete the executory bequest which follows the gift for life". That condition was not fulfilled here, so that the second half of the residuary estate vested in Rishikesh. Once an estate has thus vested in a Hindu he cannot be divested of it. See *Kalidas Das* v. *Krishna Chandra*[2]. There is no doubt that a Hindu may make a will, *Mahalachmee Ammal* v. *Gopoo Nadaraja Chetty*[3]; the extent

1. (1897) L.R. 24 I.A. 93 at p. 105: 21 Bom. 709 (P.C.).
2. (1869) 2 Beng.L.R. 103.
3. (1856) 6 M.I.A. 309, at p. 344.

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of his testamentary powers however, remains regulated by Hindu law; See *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee*[1]. It is not sufficient by way of supporting a future gift, to effect what really amounts to a trust device. A proper estate in the property must be established immediately by the will. (Counsel referred to *Mussamat Bhoobun Moyee* v. *Ram Kishore Acharj Chowdhry*[2], *Baboo Beer Pertab Sahu* v. *Maharajah Rajendar Partab Sahu*[3], *Sreemutty. Soorjemoney Dasee* v. *Denobundoo Mullick*[4], and *Tagore* v. *Tagore*[5]. Delivery of possession is essential at Hindu law, see Mayne's Hindu Law (8th ed.) para 378; (10th ed.) para 725.

(Counsel further referred to *Moniram Kolita* v. *Kerry Kolitany*[6], *Amarendra Mansingh* v. *Sanatan Singh*[7], *Vijay Singji Chhatrasingji* v. *Shivsangji Bhimsangji*[8].

Parekh, following referred to *Kalidas Das* v. *Krishna Chandra*,[9] *Tagore* v. *Tagore*[10], and *Lalit Mohun Singh Roy* v. *Chukkum Lal Roy*[11], Stokes on Hindu Law, at p. 188 and submitted that a donee's possession must derive directly from the donor under a will. He also referred to *Bhupendra Mohun Roy* v. *Srimati Purna Sashi Debi*[12].

Sir T. J. Strangman and *W. K. K. Page*, for respondent, the Official Trustee of Bengal. It is conceded by the appellants that if there were a gift under the will to Rishikesh for life and then to his male issue that would be valid, but they contend that there is no prior interest supporting the gift to the Roopchand Trust. Authority in the respondents' favour to meet that point is to be found in *Bhupendra Mohun Roy* v. *Srimati Purna Sashi Debi*[12]. The interest in the 2nd half of the residuary estate vested in Rishikesh on the testator's death. His interest was only a limited one, so that the executory bequest to the Roopchand Trust is good. There is no such abeyance here as is set up on behalf of the appellants as necessitating the existence of a prior estate to support the gift.

(*Lord Thankerton.*—A departure from strict Hindu law has developed. The decisions on this subject follow the analogy of gifts. If the analogy is to be extended it is for the respondents to show why.)

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1. (1859) 8 M.I.A. 66 at p. 85.
2. (1865) 10 M I.A. 279.
3. (1867) 12 M I.A. 1 at pp. 37 and 38.
4. (1862) 9 M.I.A. 123.
5. (1869) 4 Beng.L.R. O.J. 103 at pp. 158, 162; and (1872) L.R.I A. Supp. 47 at 66.
6. (1879) L.R. 7 I.A. 115 at p. 153.
7. (1933) 65 M.L.J. 203: L R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.).
8. (1935) 68 M L.J. 701: L.R. 62 I.A. 161: 59 Bom. 360 (P.C.).
9. (1869) 2 Beng.L.R. 103.
10. (1872) L.R. I.A. Supp. 47.
11. (1897) L.R. 24 I.A. 76.
12. (1939) 2 M.L.J. 479: L.R. 66 I.A. 265: I.L.R. (1939) 2 Cal. 486 (P.C.).

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In *Soorjeemoney Dossee* v. *Denobundoo Mullick*[1], it is nowhere suggested that there must be a supporting interest to a future gift by will.

(Counsel referred to *Tagore* v. *Tagore*[2], and Lord Thankerton referred to p. 64.)

(*Mr. Jayakar.*—The question is how much of the analogy between gifts inter vivos and gifts by will remains after *Tagore* v. *Tagore*[2], and *Bai Motivahoo* v. *Bai Mamoobai*[3]. A movement away from the law of gifts is evident in the latter case at p. 104. It is necessary to consider whether in that case the Board meant to say that there must be a life interest supporting an executory devise).

On the authorities I submit that the Board should approach the matter as indicated in *Soorjemoney's case*[1], and examine whether there is anything mischievous in allowing a testator to give property whether by way of remainder or by way of executory bequest. Once it is conceded that the testator can make a future gift with a supporting gift, on what principle should he be debarred from making such a gift without a supporting gift? In neither case does any physical act of acceptance take place. If the result is not in conflict with the principles of Hindu law why should it be attached on the ground of the means adopted? In any case it is submitted an acceptance by all takers, including the future takers can be assumed.

(*Sir George Lowndes.*—No. The Board has decided otherwise on that matter.)

It is submitted that, following the tests laid down in *Soorjeemoney's case,* this gift should be upheld.

Page, following.—the law is correctly stated in the 8th edition of Mulla para. 391. None of the prohibitions there referred to are to be found here. It is only by a lapse that the testator here has failed to dispose of the beneficial estate for the interim as he might easily have done.

Pugh, K. C.—replied.

16th January, 1940 Their Lordships' judgment was delivered by

Sir George Rankin

SIR GEORGE RANKIN.—One Shib Chandra Mullick, a Hindu governed by the Dayabhaga, was possessed of considerable property moveable and immovable, comprising a number of

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1. (1862) 9 M.I.A. 123. 2. (1872) L,R. I.A. Supp. 47
3. (1897) L.R. 24 I.A. 93: 21 Bom. 709(P.C.).

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house properties in Calcutta and its suburbs, as well as zemindari property in the Sundarbans. He died on the 4th August, 1866, leaving him surviving a widow and an only son, Rishikesh Mullick. By his will, dated 3rd August, 1866, he appointed one Dwarkanath Bhanjoo, his son Rishikesh and the Administrator-General of Bengal for the time being (who never acted) to be "executors and trustees of this my will". After providing for his widow's maintenance and residence and giving pecuniary legacies to her and to certain other persons, he disposed of the residue of his property as follows:—

"I give, devise and bequeath all the rest, residue and remainder of my property moveable and immoveable unto my Executors hereinafter named in trust as to one moiety thereof for my only son Rishikesh upon his attaining the age of twenty-one years and as to the other moiety thereof In trust for the male issue of my said son Risicase (Rishikesh) share and share alike if more than one and if only one to that only one but in case my said son should die without male issue or leaving male issue such male issue should die under the age of sixteen years without leaving male issue him or them surviving then as to that moiety In trust to be paid over to the Trustees and added to the Trust Fund known as Roopchand Dhur Trust Estate and subject to the trusts thereof and in case my said son Rishikesh should die before attaining the age of twenty-one years and without leaving male issue him surviving or to be born after his death in due course of time then as to the moiety of the moveable and immoveable estate bequeathed and devised to him In trust to be paid over to the Trustees and added to the Trust Fund known as Roopchand Dhur Trust Estate and subject to the Trusts thereof."

No question now arises as to the moiety which was given to Rishikesh ("the first moiety"), but as to the other moiety ("the second moiety") the present appeal raises questions as to the validity and effectiveness of the gift to the Roopchand Dhur Trust Estate. It is to be observed that the will came into effect before the Hindu Wills Act of 1870 and that the validity of its provisions must be judged according to the Hindu law in force in Bengal in 1866.

On 14th August, 1866, probate of the will was granted to Rishikesh and Dwarkanath Bhanjoo, who took possession of the testator's estate. On 9th January, 1873, Rishikesh, having attained the age of 21 years died intestate, never having had a son, but leaving him surviving a widow, Purasundari, and a daughter. The appellants' averments as to what happened after the death of Rishikesh may for the purposes of this appeal be accepted and are stated in their "Case" as follows:—

"It appears from mutation papers and cess returns exhibited in the case that after the death of Rishikesh Dwarkanath Bhanjoo continued to act as sole surviving executor till the year 1880, when he applied for mutation of

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names in favour of Purasundari, and in 1881 or 1882 made over the whole estate to her. The widow as heiress of Rishikesh remained in possession of the whole of the testator's residuary estate until her death, which occurred on the 11th September, 1932. During this long period of 50 years neither the plaintiff nor anyone else interested in the Roopchand Dhur Trust claimed under the will or questioned the right of the lady until the present suit of 1934."

On 27th April, 1934, the Official Trustee of Bengal (respondent No. 1) filed a suit in the High Court at Calcutta claiming as trustee of the Roopchand Dhur Trust to be entitled under the terms of the testator's will to the whole of his residuary estate: alternatively, to one half thereof. He impleaded the present appellants, who are the reversioners of Rishikesh, as persons wrongfully claiming the estate and wrongfully in possession thereof. The claim to the first moiety (which by the terms of the will was given to Rishikesh on his attaining the age of 21 years) was abandoned at an early stage of the suit. But as to the second moiety the suit succeeded before the trial Judge (Ameer Ali J.) and also on appeal to a Division Bench (Costello and Panckridge JJ.). A preliminary decree for partition was made (28th June, 1937) and affirmed on appeal (6th April, 1938).

The first question is whether the suit is barred by limitation and this defence must prevail unless section 10 of the Limitation Act, 1908, applies to the case.

"Section 10. Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representative or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time."

The appellants contend that this section does not deprive them of the protection *prima facie* afforded to them against stale claims by the appropriate articles in the schedule. They point to the fact that under the will no right arose to the Roopchand Dhur Trust in respect of the moiety now in question until after the death of Rishikesh. Hence they deny that Rishikesh in his lifetime was ever a trustee. They maintain that, even if he was a trustee, his widow took from his surviving co-trustee Dwarkanath Bhanjoo: hence that neither she nor the appellants are to be regarded for the purposes of section 10 as the legal representatives of a trustee. To this a further argument is added that the widow received the estate from the surviving executor at a time when any claim to a legacy or a

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distributive share by the plaintiff had become barred by limitation.

This defence, in their Lordships' opinion fails. That the interest of the Roopchand Dhur Trust did not arise until the death of Rishikesh is clear enough, in the sense that before that date it was a contingent interest; but Rishikesh as one of the executors and trustees of his father's will had a duty in his lifetime to preserve the property of which the residuary estate consisted. There was an express trust for a specific purpose and he was under a duty to fulfil that part of it which required fulfilment in his lifetime. But when he died he ceased to be a trustee and Dwarkanath Bhanjoo became sole trustee. On the appellants' own showing Purasundari took from him and is the assign of a trustee. As it is not pretended that she gave valuable consideration, the defence of limitation is not available to her but is excluded by the terms of section 10. Had the plaintiff in 1881 or 1882 sued Dwarkanath to recover the share of residue given to the Roopchand Dhur Trust, section 10 would have had the same effect to exclude any plea of limitation raised by the trustee.

The validity of the bequest of the second moiety to the Roopchand Dhur Trust Estate must therefore be examined. The first limitation of the beneficial interest in this moiety is to the male issue of Rishikesh. This failed as he had no male issue at the death of the testator (or at any other time). There is no other disposition of the beneficial interest which could take effect in the lifetime of Rishikesh. But there is a limitation to the Roopchand Dhur Trust Estate which is to take effect in either of two events (*a*) in case Rishikesh should die without male issue (which probably means without leaving male issue), (*b*) in case Rishikesh should die leaving male issue but such male issue should die under the age of 16 years without leaving male issue him or them surviving. The former is the event which happened: the state of affairs described in (*b*) on any view of that provision did not happen. Clearly the two contingencies are independent and indeed mutually exclusive. Hence though the gift to the Roopchand Dhur Trust might be invalid had it been claimable solely on the ground of fulfilment of condition (*b*), this consideration would not in any way invalidate the gift if, in the events which happened, it was claimable under (*a*). Panckridge J. put the matter simply and

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correctly: "if the testator has separated the gift so as to take effect upon the happening of any of several events, and the event which happens is not too remote, the gift over is good."

The bequest to the Roopchand Dhur Trust which has here to be considered is therefore a bequest to take effect on the death of Rishikesh without male issue, the disposition intended to have effect during the life of Rishikesh having failed. It is not disputed that had the will given an estate for life to Rishikesh and then directed that upon his death without leaving male issue it should go to the Roopchand Trust Estate, this conditional limitation would have been good. The question for decision is as to the effect at Hindu law of the failure of the testator's disposition of the interest in this moiety during the life of Rishikesh. The view taken by the learned judges in the High Court is that the gift to the Roopchand Dhur Trust Estate is good and took effect on the death of Rishikesh, who as heir of the testator took the prior interest for his own life in this moiety, such interest not having been disposed of by the will. The view contended for with much learning and ability by Mr. Pugh and Mr. Parikh on behalf of the appellants is that the gift to the Trust Estate is void at Hindu law, no interest being taken under the will by any ascertained person at the time of the testator's death. There is therefore, it is said, no possibility of relinquishment by the testator and acceptance by or on behalf of the legatee being supposed to have taken place at the time of the testator's death as required by Hindu law. The same result is contended for on a broader, if not necessarily a separate ground—that, there being no gift taking effect at the time of the testator's death, there was therefore an intestacy, and Rishikesh took this moiety as heir; with the result that it could not thereafter be divested. From the principle that on the death of a Hindu, the right of succession to his property cannot remain in abeyance, it is said to follow that where there is a will, property, unless vested by the will in a devisee or legatee immediately on the death of the testator, must go to the heir and all the provisions of the will as to the property must fail.

These arguments require that their Lordships should consider the Hindu law upon the subject of conditional limitations in order to ascertain the principles which determine the validity of a bequest which by its terms is to take effect at the close of a life in being but only upon the happening of an uncertain event.

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It is necessary that a prior interest taking effect immediately on the death of the testator should have been bequeathed by the will? The history of the recognition by British Indian Courts of the testamentary power at Hindu law has been traced by Mr. Mayne in chapter XI of his well-known work and it is sufficiently plain that the Hindu will in its present form is a development since the middle of the eighteenth century. It is not, therefore, necessary at this stage to discuss whether the notion of a will is an original part of the Hindu law [*cf.* the judgment of Norman J. in the *Tagore case*[1],] Nor can the course of the decisions be now diverted by any conclusion that could be reached as to the true intention of the first chapter of the Dayabhaga—that is, whether it teaches, contrary to the Mitakshara, that the donee's right arises by the donor's act of relinquishment alone and does not require acceptance by the donee [*cf.* Sarkar's "Hindu Law," 7th ed. p. 991. Dayabhaga I 22].

The right of a Hindu in Bengal to make a will was recognised by this Board in 1856 as well established, it being stated that "the strictness of the ancient law has long since been relaxed" [*Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty*[2].] But in a later case it was said on behalf of the Board by Lord Justice Turner that "with reference to the testamentary power of disposition by Hindoos the extent of this power must be regulated by the Hindoo law" [*Sonatun Bysak* v. *Srm. Juggutsoondree Dossee*[3]].

In 1862 the question whether a person in existence at the date of the testator's death might become entitled upon a future contingency to receive an additional benefit was directly dealt with by a judgment delivered by Lord Justice Knight Bruce on behalf of a Board which had the aid as assessors of Sir Lawrence Peel and Sir James Colvile [*Sm. Soorjeemoney Dossee* v. *Denobundoo Mullick*[4]]. There, a Hindu in Bengal had by his will given the whole of his estate to his five sons in equal shares, but had provided that if any son should die [not leaving any son or son's son] that share should not go to the widow or daughter of the testator's son so dying or to any daughter's son, but should go to "such of my sons and my son's sons as shall then be alive:" One of the testator's sons having died without male issue his widow claimed his fifth share as his heir.

1. (1869) 4 Ben.L.R.O J. 103, 219. 2. (1856) 6 M I.A. 309, 344.
3. (1859) 8 M.I.A. 66, 85. 4. (1862) 9 M.I.A. 123.

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It was held by the Supreme Court (*per* Sir Barnes Peacock C.J.) that "the limitation over was valid as an executory bequest." This Board, pressed with the observation previously made by Lord Justice Turner, considered whether the Hindu law prohibits such a provision. Lord Justice Knight Bruce said:

"Whatever may have formerly been considered the state of that law as to the testamentary power of Hindoos over their property, that power has now long been recognized, and must be considered as completely established. This being so, we are to say, whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindoo law in allowing a testator to give property, whether by way of remainder, or by way of executory bequest (to borrow terms from the law of England), upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not; that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist. Such powers have been long recognised in practice. The law of India, at least the law of Bengal, has long been administered upon that basis, and the very mode in which this suit has been framed, and the manner in which it was conducted in India, are evidence, if evidence were wanting, that such is the general opinion entertained in Bengal. Their Lordships, therefore, being of opinion, as has already been stated, that according to the true meaning of this will the property was given over upon an event which was to take place, if at all, immediately on the close of a life in being at the time when the will was made, and seeing that that event has happened, consider that the testator, in making this provision, did not infringe or exceed the powers given him by the Hindoo law, and that the clause effectually gives the corpus of the property to the surviving sons immediately on the death of that son who died without leaving male issue."

No question arose or appears to have been raised as to the necessity for every donee to have been in existence at the testator's death. As was later noticed [in the *Tagore case*[1],] it was sufficient to reject the claim of the widow without considering whether sons of any other deceased son of the testator could have claimed to participate in her deceased husband's share. But the words "remainder" and "executory bequest" which the Lord Justice "borrowed" to express his meaning were somewhat unreasonably taken as introducing the technicalities of English law into the Hindu law. The words, however, were used together for the very purpose of excluding such technicalities—the differences between contingent remainders and executory devises not being in point in connection with a Hindu will. What were those differences? They turned upon whether there was or was not a particular prior estate, whether it was an estate of freehold, whether it was conferred by

1. (1869) 4 Ben. L.R. 103 at 193-4.

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the same will, whether the subsequent interest was to take effect at the natural determination of the prior estate, or before or after that event. The language of the Lord Justice disregards all such matters and contains nothing to intimate that there is any need for a conditional limitation to be "supported" by any prior estate conferred by the same will, though it is expressly restricted to dispositions which must take effect immediately at the close of a life in being. This stipulation has nothing whatever to do with any doctrine of the Hindu law and the use of the technical phrase "executory devise" is enough in itself to show that the Lord Justice is not intending to confine his remarks to estates dependent for their validity upon their relation to a prior (particular) estate. Sir Barnes Peacock, in the *Tagore case*[1] appreciated that the words "remainder" and "executory bequest" were used to mean "conditional limitations"; and in an unanswerable passage emphasised the absurdity of applying the English law of contingent remainders and executory devises, of springing and shifting uses, to cases governed by Hindu law which knows nothing of freehold estates. The language of Lord Kingsdown in *Bhoobun Moyee* v. *Ram Kishore*[2], was that though the testamentary power of disposition among Hindus had been established in Bengal, "it would be to apply a very false and mischievous principle if it were held that the nature and extent of such power can be governed by any analogy to the law of England." This observation was not required to correct anything said in *Soorjeemoney's case*[3] but was evoked by the fact that a Judge of the Sudder Court had, in the case then before the Board, applied to a Bengalee deed the rules which he discovered in "Fearne on Contingent Remainders." Still, it might not be candid to deny that *Soorjeemoney's case*[3] had dealt abruptly rather than meticulously with Hindu law and was in some respects lacking in precision: hence subsequent decisions must be scrutinised to see if they restrict the freedom of bequest which it allowed.

In a case which raised a question as to the property over which the testator had power of disposition, Sir James Colvile in [*Babro Beer Pertab Sahee* v. *Maharajah Rajinder Pertab Sahee*[4]] said:

1. (1869,) 4 Ben. L.R. O.J., 103 at 193-4.
2. (1865) 10 M.I.A. 279, 308.
3. (1862) 9 M.I.A. 123.
4. (1867) 12 M.I.A. 1 at 38.

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" Decided cases too numerous to be now questioned, have determined that the testamentary power exists, and may be exercised, at least within the limits which the law prescribes to alienation by gift *inter vivos*"

But little can be gained by an attempt to construe narrowly this cautious observation.

In the *Tagore case*[1], Phear, J., as trial Judge treated *Soorjeemoney's case*[2] as authority for holding that a gift could be made by will to a person not in existence at the testator's death and for the general application of English principles of law to the limitations in a Hindu will. On appeal, Peacock, C. J., and Norman, J. over-ruled those opinions. They went elaborately into the essentials of a gift at Hindu law with special reference to the question whether a person could take if not in existence at the date of the relinquishment by the donor. The learned Chief Justice held that on general principles of Hindu law the donee under a gift *inter vivos* must be in existence at the date of the gift and the donee under a will must be in existence at the date of the death of the giver.

He does not seem to have felt any difficulty in the case of what in English law would be called vested remainders. But he considered that on the principles of the Hindu law a gift whether *inter vivos* or by will "cannot be made in such a manner as that the donee cannot be ascertained at the time at which the property by virtue of the gift or devise ceases to be that of the donor or testator." Citing the first chapter of the Dayabhaga he observed that "there is nothing to show that after property has ceased by virtue of a gift to be that of the donor there can be any contingency or uncertainty as to the person in whom it is to vest or that the property can be so given by will as to remain in abeyance or *in nubibus* until the donee comes into existence." He doubted whether it was consistent with Hindu law that executory bequests should be sanctioned. On the other hand, he recognised that, in *Soorjeemoney's case*[2], by his own decision and the decision of the Judicial Committee, the conditional limitation which, by borrowing terms from English law, was called an "executory bequest" had been held valid according to Hindu law. He also recognised that upon the Hindu texts a gift may be made upon condition and that "even a gift in remainder upon condition is good." Like Norman, J., he noticed verses 4 and 5 in the first chapter of the

1. (1869) 4 Ben.L.R.O J. 103; (1872) L.R.I.A. Supp. 47.
2. (1862) 9 M.I.A. 123.

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Dayabhaga where it is said that "daya" (heritage) signifies what is given [pp. 188, 218]. From this he drew the conclusion that both in the case of a gift and in the case of inheritance property must arise immediately in the heir or donee upon death or relinquishment by the owner.

In agreement with the Appellate Bench of the High Court it was held by the Judicial Committee (*a*) that the gift of a life estate was valid even though made to a son; (*b*) that a testator cannot create an estate which is unknown to the Hindu law, for example, an estate in tail male and (*c*) that a gift cannot be made by will to a person not in existence at the time of the testator's death. The general principle governing wills was stated in the judgment delivered by Willes, J., on behalf of the Board as follows: "The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer and the persons to whom it can be transferred."

It is important that the close connection between the several branches of this decision should not be overlooked. If Hindu law, whatever may have been its earliest form, is to have regard not only to absolute or complete ownership in property but to limited interests therein—life estates followed by other life estates or by remainders—some modification may be necessary in the abstract theory of gift as applied to wills. Again, so long as it was in doubt whether an unborn person could take under a will it was difficult to recognise contingent or executory bequests in view of the absence from Hindu law of any rule against perpetuity. But those matters being settled, a provision that the taker must be in existence at the date of the testator's death would seem to preserve the essential principle of the Hindu law in a form not inconsistent with effective testamentary power. The facts of the *Tagore case*[1] itself did not call for any more detailed treatment of executory bequests. A large number of contingent remainders had been given by the will but all of these failed and certain contingent life interests likewise failed. The original life estate given to Juttendro was held to be valid, and it does not appear to have been doubted that a Hindu could validly create contingent interests.

1. (1872) L.R.I.A. Sup. 47. 2. (1862) 9 M.I.A. 123.

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The effect of this case upon *Soorjeemoney's case*[1] in their Lordships' opinion was to show how the principles of the Hindu law of gift were to be applied to wills. It established, though not as a definition in all respects precise, that the scope of such principles was to determine the property which could be transferred and the persons to whom it could be transferred. The donee under a will must be such a person as was capable of taking according to Hindu law. There is nothing in the judgment of Willes, J., to suggest that a person capable of taking because in existence at the death of the testator will have further difficulties to surmount by showing that he accepted at the time of the death the interest which the testator intended him to have—a condition which Peacock, C. J., and others had held, with complete logic, to exclude the possibility of executory bequests. On the other hand the judgment did contain a warning that the Hindu law of gift was not of universal applicability to Hindu wills. It need not, however, be taken as a final decision upon matters not fairly raised by the facts of that case or *Soorjeemoney's case*[1].

In later cases before the Board the question of the absence or failure of a disposition of the prior interest did not arise, but the references to *Soorjeemoney's case*[1], disclose no suggestion that the gift of a prior interest is necessary. In *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry*[2], the sanad was held upon its true construction to give to the grantor's sister an absolute interest in certain villages defeasible in the event of a failure of her issue at the time of her death, in which event it was to revert to the donor or his heirs. In *Ram Lal Mookerjee* v. *Secretary of State*[3], the testator gave his estate in the events which had happened, to his widow for the interest of a Hindu widow and the "reversion" to his daughter's daughter Hori Dasi. Sir Robert Collier referred to *Soorjeemoney's case*[1], the *Tagore case*[4], and the case last cited, saying that since these cases it could not be disputed that "a gift by will upon an event which is to happen, if at all immediately upon the close of a life in being, to a person in existence, and capable of taking under the will at the testator's death, was good and valid under Hindu

1. (1862) 9 M.I.A. 123. 2. (1878) L.R. 5 I.A. 138; I.L.R. 4 Cal. 23.
3. (1881) L.R. 8 I.A. 46: I.L.R. 7 Cal. 304.
4. (1872) L R.I.A. Supp 47.

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law, and consequently that it was competent to the testator, by the use of apt words, to confer an absolute estate on Hori Dasi on the death of his widow" (p. 61). In *Tarakeswar Roy* v. *Shoshi Shikhareswer*[1], the will was held to give a life estate to each of the three nephews of the testator with a gift over, of the share of any nephew dying without leaving male issue, to the other nephews for life. Sir Robert Collier said that "the gift over was to persons alive and capable of taking on the death of the testator, to take effect on the death of a person or persons also then alive, and was competent according to the authority of *Seemutty Soorjeemoney Dossee* v. *Denodundhoo Mullick*[2], as explained in the *Tagore case*[3]". In *Sm. Kristoromoney Dossee* v. *Maharajah Norendro Krishna*[4], the same principles were re-stated with reference to the defeasance of a prior absolute interest by a subsequent event, though the ultimate result of the will was to give to the testator's half-brothers an estate for life in remainder expectant on the death of the daughter who was given the first life interest.

In 1898 in the case of *Amrito Lall Dutt* v. *Surnomoni Dasi*[5], the argument for which the appellants now contend was accepted by Trevelyan, J., though Maclean, C.J., and Macpherson, J., found it unnecessary to express any opinion on the matter. From his judgment it sufficiently appears that Trevelyan, J., considered that the doctrine to which he assented was to be found in the *Tagore case*[3]:—

"According to that (Hindu) law there must, as I understand it, be a present beneficiary in order to make a gift valid. There may be a gift *in future* but there must also be a gift *in present*. The law of gifts and of wills is the same, and in order that there may be a valid gift the donor must immediately divest himself of the property in favour of some existing beneficiary, and in the same way with regard to wills there cannot be a gift to a person to come into operation at a future date unless there be a gift to a beneficiary in the interim. This is as I understand it merely what was decided in the *Tagore case*[3]. In the judgment of that case we find the following: 'Their Lordships for the reasons stated are of opininn that a person capable of taking under a will must be such a person as could take a gift *inter vivos* and must either in fact or in contemplation of law be in existence at the death of the testator."

With all respect to this opinion of a distinguished learned Judge, their Lordships think it is open to the objection that the

1. (1883) L.R. 10 I.A. 51: I.L.R. 9 Cal. 952.
2. (1862) 9 M.I.A. 123.
3. (1872) L.R.I.A. Supp. 47.
4. (1888) L.R. 16 I.A. 29: I L.R. 16 Cal. 383 (P.C).
5. (1898) I.L.R. 25 Cal. 662 at 690-1.

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passage quoted is no authority for the doctrine advanced, and their Lordships find no otherp assage in the judgment of Willes, J., which contains such doctrine.

In *Bai Motivahoo* v. *Bai Momoobai*[1], the judgment of the Board was delivered by Sir Richard Couch. The testator had by his will devised immoveables upon certain trusts during the lifetime of his daughter Mamoo and her children: if there were no children, the property was to go to such persons as she might appoint by will. Farran, J., held that the gift to Mamoo was an absolute gift: a Division Bench (Sargent, C.J., and Bayley, J.), on appeal rejected this view but upheld the power of appointment as valid at Hindu law provided that it was exercised during the lifetime of the tenant for life and that the appointee should have been alive at the death of the testator.

Soorjeemoney's case[2], and the *Tagore case*[3], were considered by the Board, and Sir Richard Couch stressed the passage from the judgment of Willes, J., in the latter case where it was said that wills are generally to be regarded as gifts to take effect upon death "as to the property which they can transfer and the persons to whom it can be transferred." Sir Richard Couch's judgment continued:—

" These appear to their Lordships to be the limits of the analogy between wills and gifts *inter vivos* which have been recognised. They are not aware of any authority in support of Mr. Mayne's contention, as they understood it that in the present case there would not be such a transfer of possession to the person who would take by virtue of the power as is necessary to enable it to be validly exercised. It appears to them to follow, from the first taker being allowed to have only a life interest, that his possession is sufficient to complete the executory bequest which follows the gift for life. The resalt of the decisions is that, according to settled law, if the testator here had himself designated the person who was to take the property in the event of Mamoo dying childless, the bequest would be good. The remaining question is whether his substituting Mamoo and giving her power to designate the person by her will is contrary to any principle of Hindu law. There is an analogy to it in the law of adoption A man may by will authorize his widow to adopt a son to him, to do what he had power to do himself and although there is here a strong religious obligation, their Lordships think that the law as to adoption shows that such a power as that now in question is not contrary to any principle of Hindu law. Further, they think that the reasons which have led to a testamentary power becoming part of the Hindu law are applicable to this power, and that it is their duty to hold it to be valid. But whilst saying this they think they ought also to say that in their opinion the English law of powers is not to be applied generally to Hindu wills."

1. (1897) L.R. 24 I.A. 93: I.L.R. 21 Bom. 709 (P.C.).
2. (1862) 9 M.I.A. 123.
3. (1872) L.R.I.A. Supp. 47.

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It is contended for the appellants that by this decision the Board introduced a requirement extending the analogy of gifts beyond the two matters mentioned by Willes, J. and making the validity of limitations to take effect after the testator's death upon an uncertain event depend upon whether or not by his will he has interposed a life estate so as to have provided a first taker under the will whose possession is "sufficient to complete the executory bequest". The exact effect of the judgment upon this point is not altogether plain. It may be observed that, until this case, it had not at any time been held by the Board or even suggested in any of the cases before the Board that the Hindu law as to conditional limitations was to be operated by a fiction imputing to the devisee the possession of a previous taker under the will. In a well known textbook—West & Buhler, "Hindu Law", 3rd ed. 1884—the learned authors had contended that an executory devise as distinguished from a remainder could not properly be received into the Hindu system (p. 217). As regards remainders they appear to have thought that these could be reconciled with Hindu legal principles if the entry or acceptance of the taker of the immediate particular estate might enure for the benefit of the remainderman. The learned authors were well aware that *Soorjeemoney's case*,[1] had permitted executory bequests and indeed were under no illusions as to the fictitious character of the doctrine which applies to wills the notion of a resignation by the previous holder and a simultaneous release of the physical detention (or delivery) to the donee (pp. 218-9). Sargent C.J. in the High Court rightly interpreted these reflections as showing that both remainders and executory devises are "opposed to the strict notions of a gift", and had refused to regard that consideration as conclusive.

Whatever might be said of the *Tagore case*,[2] if taken by itself, the Board in Sir Richard Couch's judgment is noting that the analogy between gifts and wills at Hindu law is one as to which certain limits have been recognised. This would seem to mean that save as regards the property which may be disposed of and the person who is capable of taking, the analogy according to the authorities was inapplicable or at least was so far unauthorised. Their Lordships do not gather from the judgment that Sir Richard Couch intended to remove or extend the

1. (1862) 9 M.I.A. 123.
2. (1872) L.R.I.A. Supp. 47.

limits to which he refers or to lay down principles to govern cases of a character not then before the Board. On the contrary, he would appear by his observation about the possession of the first taker to be answering on its own premises an argument about transfer of possession and saying that the authorities do not bear it out; with the result that it becomes unnecessary to interfere with or to go beyond the limits to which he has referred.

Mr. Mayne's argument as to the impossibility of "transfer of possession" does not clearly appear from the reports, but it had reference doubtless to the fact that the appointee might be anyone alive at the testator's death whether known to the testator or not. It may well have been thought sufficient answer to point out that this uncertainty as to the beneficiary raised no greater difficulty than was present in the case of any gift in remainder upon a condition. In any case the observation made is that "it appears to them to follow from the first taker being allowed to have only a life interest" that his possession was sufficient to complete the executory bequest; but the Board had repeatedly upheld such bequests where they took effect to divest an absolute estate. The principle upon which the Board in the end proceeded was the same as in *Soorjeemoney's case*,[1]—not that the strict original theory of the Hindu law of gift required no extension if it were to cover the case—but that "the reasons which have led to a testamentary power becoming part of the Hindu law are applicable to this power" and that "the power was not contrary to any principle of Hindu law". Their Lordships are not of opinion that *Soorjeemoney's case*,[1] has been narrowed by this later decision so as to exclude a well-known class of conditional limitations by introducing a doctrine as to the need for a particular estate to support a limitation made to commence *in futuro*.

In *Bhupendra Krishna Ghose* v. *Amarendra Nath Dey*,[2] the High Court at Calcutta again dealt with the question now at issue. A Hindu of Bengal had died sonless in 1907 leaving a will whereby he appointed his wife sole executrix and authorized her to adopt five sons in succession:—

"If my said wife dies without adopting a son or if such adopted son predeceases her without leaving any male issue, in such case my estate after

1. (1862) 9 M.I.A. 123.
2. (1913) I.L.R. 41 Cal. 642; on appeal (1915) L.R. 43 I.A. 12: I.L.R. 43 Cal. 432: 30 M.L.J. 110 (P.C).

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the death of my said wife should pass to the sons of my sister Sm. Benodini Dasee who may be living at the time of my death".

The widow in 1909 adopted a son who on 11th March, 1910, died unmarried; the widow died a few days afterwards not having adopted any other son. The arguments addressed to the High Court and to this Board were exactly those urged for the appellants in the present case and turned on the fact that there was in the will no express gift of any life interest to the widow but a provision for maintenance (Rs. 300 per month) and residence in the family house. Fletcher J. (pp. 646-7) as trial judge referred to *Soorjeemoney's case*[1] saying:—

"It is quite true that in that case the Privy Council were considering the case of an executory devise or a gift over where a previous gift had been made by the will, but there is nothing to my mind from which I can hold that their Lordships considered or meant to infer that if the testator had left a particular interest in property undisposed of, that an executory estate created by his will was *ipso facto* void."

[and again.]

"I have heard nothing in the argument to convince me that the supposed rule of Hindu law that after the succession has opened out the testator is not able to regulate the course of successions in fact exists."

Sir Lawrence Jenkins, C. J., with whom Woodroffe, J., agreed took the same view:—

"The appellant based his contention on two grounds. First, he argued, that if property vests in a full owner under the ordinary Hindu law of inheritance, then the future devolution of the property from him cannot be disturbed except by a restriction imposed from the beginning. Next, he maintained that if effect were given to the bequest in favour of the sons, there would be such an uncertainty as to who would take, that the property would be in abeyance, and this would contravene a fundamental rule of Hindu law. I am not much impressed by either of these contentions. The first is founded on a fallacy, for it assumes that the comple interest in the property has devolved on the full owner. But that is the very point in dispute, for if the bequest is operative, there would be merely a partial intestacy, and only a qualified interest would vest in the widow or adopted son as the case might be. The conditional bequest would not be an attempt to give an unauthorised direction to property vested in a full owner, but simply the curtailment of the interest in that property. Nor do I think the second line of argument possesses any greater merit, for I see no ground for saying that the property would be in abeyance, or that there was any more uncertainty as to the destination of the property than in (*sic*) the necessary consequence of every contingent bequest. . . .

It has been argued that the interest preceding this bequest to the defendants arose by implication under the will: but, whether this be the true view or not, I think the bequest is good. It does not infringe any rule against remoteness, nor are the legatees incapable of taking. It is true that the bequest is contingent, but that does not avoid it (S. 107 and Part XV of the

1. (1862) 9 M.I A. 123.

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Succession Act). Nor was it fatal to the bequest that it was to take effect not necessarily at the testator's death, but possibly at a future date. This view is sanctioned by the illustrations to S. 107. It has never been suggested that an annuity cannot be created by a Hindu will, and yet according to Lord Cottenham an annuity of £100 is the gift of 'as many sums of £100 as the donee shall live years:' *Blewitt* v. *Roberts*[1].

And so a bequest of a legacy, or of an estate on a future contingent event, would be good within the meaning of S. 107 of the Succession Act: see the illustrations to that section and *Soorjeemoney Dossee* v, *Denobundoo Mullick*[2].

But if the future contingent bequest of a sum of money, or an estate, or a farm or a fund all of which are mentioned in the illustrations to S. 107, be sanctioned, why is the bequest in this will bad? It was conceded by counsel for the petitioner that if the bequest had been of a sum of money it would have been good, unless it was a sum of money that exhausted the whole estate: this it was argued, would have been a fraud on the law. In other words according to the petitioner the validity of the legacy is dependent upon its relative amount. I am unable to perceive any sound principle in this"

Delivering the judgment of the Board, Mr. Ameer Ali said:—

"It is to be observed that the will in this case does not infringe the rules which lay down the limitations on the testamentary powers of a Hindu. The bequest is to persons who were in existence at the time of the testator's death and he does not create any estate unknown to the Hindu law."

The judgment proceeded to hold that the estate was in the widow for her life, that it could only pass to an adopted son who should survive her or to his male issue if he predeceased her leaving such issue, and that the gift over was good. On this view there was a gift by the will of a prior interest during the widow's life so that the difficulty vanished.

In a recent case *Bhupendra Mohan Roy* v. *Sm. Purna Sashi Debi*[3], the facts, in the view ultimately taken by the Board, raised the present question, but their Lordships have accepted the suggestion of the appellants' counsel that as it was not fully argued they should not regard that case as precluding the appellants' contentions upon this appeal.

Reviewing the authorities and considering them on principle their Lordships are of opinion that the rule which the Board in *Soorjeemoney's* case[4], thought necessary to the existence of effective testamentary power and which was explained in the *Tagore* case[5], with reference to the Hindu Law of gift is

1. (1841) 1 Cr. & Ph. 274, 280. 2. (1862) 9 M.I.A. 123 at 135.
3. (1939) 2 M.L.J. 479: L.R. 66 I.A. 265: I.L.R. (1939) 2 Cal. 486 (P.C.).
4. (1862) 9 M.I.A. 123. 5. (1872) L.R.I.A. Supp. 47.

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not restricted by further conditions intended to meet or to placate a theory which regards immediacy of effect as a necessary feature of every disposition of property. In truth, inheritance is not donation, and a bequest is not a donation *de praesenti* between living people. It is to be recognised that the Hindu Law has been greatly influenced by the notion of "relinquishment in favour of a sentient being" as the basis of a gift and of inheritance, but this principle has not, as their Lordships read the previous decisions, been allowed to arrest the development of the Hindu Law of wills. The doctrine that there must be acceptance at the time of relinquishment has different values according as it is applied to gifts *inter vivos* or is extended by analogy to bequests or inheritance, though by a theory of some refinement heir and donee were once thought to be equally governed by the same principle. The theory, as has been shown from the judgment of Peacock, C. J., in the *Tagore case*[1], is sometimes put by saying that the estate cannot remain in abeyance. "Thus it appears that property in the heir must arise immediately upon the death of the ancestor in the same manner as the property of the donee arises immediately upon relinquishment by the donor". *Roy Nandipat Mahata* v. *Alexander Shaw Urquhart*[2]. And Mr. Mayne says of the author of the Mitakshara: "Apparently, in the view of Vijnanesvara, acceptance was necessary to complete a gift because, according to a Hindu lawyer, property can never be in abeyance. It cannot pass out of one until it is received by another" [Hindu Law and Usage, 6th ed., 1900, para. 376, page 484]. But it must needs be admitted that the rigour of this theory, even if it be not destructive of all future gifts is inconsistent with any recognition of contingent or executory bequests. It has effect (save in so far as the legislature has abrogated it: Hindu Wills Act, 1870, Hindu Disposition of Property Act, 1916), to limit the class of persons who are capable of taking under a will, restricting it to persons who either in fact or in contemplation of law are in existence at the death of the testator. But in their Lordships' judgment it does not remain as a further obstruction to the taking by such persons of a beneficial interest known to and permitted by the law. Indeed, if an estate in remainder can be limited to take effect

1. (1869) 4 Beng. L.R.O.J. 103.
2. (1870) 4 Beng.L R. 181 at 189.

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on the natural determination of a life estate and may be so limited upon a condition which may never be fulfilled: if a gift over on condition may be good though in defeasance of an absolute estate granted by the will, there is no principle of Hindu law to be saved by refusing to recognise a limitation to take effect upon condition in the future because it lacks "support" from a particular estate.

It cannot be disputed that if a conditional limitation is invalid, the interest, unless otherwise disposed of by the will, must go to the heir. But if limited interests are to be recognised, their Lordships see no reason to hold that because a prior interest goes to the heir as such a conditional limitation or any other limitation is bad at Hindu law.

The principle of Hindu law which prevents an estate being in abeyance is an important doctrine of the law of inheritance and it has important consequences as regards adoption. The rule is that the right of succession vests immediately on the death of the owner. Apart from the case of a chid *en ventre sa mere* or of an adopted child, the estate once vested in an heir will not be divested by the subsequent birth of a person who would have been a preferable heir had he been alive at the time of the death of the last owner. [*Kalidas Das* v. *Krishna Chandra Das*[1], *Kally Prosanna Ghose* v. *Gocool Chunder Mitter*[2], *Nilcomul* v. *Jotendro Mohan Lahiri*[3].]

In like manner, though the doctrine is not really the same, delivery in some sense is necessary at Hindu law to distinguish the completed gift from the mere promise. But neither of these doctrines nor yet the principle that a man cannot devise an interest of a nature and quality unknown to the Hindu law, for example, descendible in a manner unknown to that law) conflict with the principle that where there is a will the heir can as such take only that part of the testator's property which is not disposed of by the will. "He will take by descent and by his right of inheritance whatever is not validly disposed of by the will and given to some other person." [Sir Barnes Peacock in the *Tagore case*[4].] Their Lordships are in full agreement with Fletcher J. and Jenkins C.J. [*Bhupendra Krishna Ghose* v. *Amarendra Nath Dey*[5]] in rejecting the contention that a

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1. 2 Ben.L.R. 103 (F.B.)
2. (1876) I.L.R. 2 Cal. 295.
3. (1881) I.L.R. 7 Cal. 178.
4. (1869) 4 Ben.L.R. O.J. 103 at 187.
5. (1914) 41 Cal. 642.

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testator's directions to regulate the devolution of his property though within the limits laid down by the law will fail if the heir takes any interest immediately upon the death of the testator. This contention is not warranted by anything in the Board's judgment in the *Tagore case*[1] and as Jenkins, C.J., noticed, is founded on a fallacy; for it assumes that the complete interest in the property has devolved on the heir, which is the very point in dispute. Full weight must also be given on this part of the argument to the consideration that not only are testators allowed to dispose of limited interests—as Sir Robert Collier said "limited interests are common enough" [*Sm. Kristoromoney Dossee* v. *Maharajah Norendro Krishna Bahadoor*,[2]]—but that there is no distinction in Hindu law for the present purpose between movable and immovable property. On this point also the reasoning of Jenkins, C.J., appears to their Lordships to have much force. Its cogency is independent of any inference which might be drawn from assumptions made by the Indian legislature in the Hindu Wills Act, 1870—an enactment passed after the *Tagore case*[1] had been decided in the High Court but before it had been dealt with by the Judicial Committee.

The careful arguments of learned counsel on both sides in the present case have made clear different implications of the principle, so often appealed to, that an estate cannot remain in abeyance.

The result, however, is that the objections taken on behalf of the appellants to the bequest to the Roopchand Dhur Trust fail and their Lordships must humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the costs of respondent No. 1.

Solicitors for Appellants: *Giles and Hunter.*

Solicitors for Respondents: *Morgan, Price, Marley and Rugg.*

R.C.C.
K.S.

Appeal dismissed.

1 (1869) 4 Beng.L.R.O.J. 103; (1872) L.R.I.A. Supp. 47.
2. (1888) L.R. 16 I.A. 29 at 31: I.L.R. 16 Cal. 383. (P.C.)

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MOCKETT AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Vattipalle Eswariah .. *Appellant** (*3rd Defendant-Appellant*)

v.

Vattipalle Rameswarayya and others .. *Respondents* (*Plaintiff and Defendants Nos. 1, 2 and 4 to 8—Respondents*).

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Civil Procedure Code (V of 1908), O. 41, rr. 11 and 12 (1)—Appeal if can be admitted in part only.

By virtue of r. 11, O. 41 the appellate Court may dismiss the appeal without serving notice on the respondent but if it does not dismiss the appeal summarily it must by virtue of r. 12 (1) fix a day for hearing "the appeal". There is nothing in either rule which suggests that the Court may admit the appeal in part.

Decision of Wadsworth, J., in *Pyda Suryanarayanamurthi* v. *Vuppuloori Kamayya Sastri*, S. A. No. 1141 of 1934, overruled.

Case-law discussed.

Second appeal against the decree of the Court of the Subordinate Judge of Cuddapah in A. S. No. 17 of 1935 preferred against the decree of the Court of the District Munsif of Nandalur in O. S. No. 410 of 1930.

V. S. Narasimhachar for Appellant.

N. Appu Rao and *Ch. Raghava Rao* for Respondents.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—This second appeal has been placed before this Full Bench as it raises the important question whether the Court in dealing with an appeal under O. 41, r. 11 of the Code of Civil Procedure can direct that it be admitted in part only. The appeal arises out of a suit filed in the Court of the District Munsif of Nandalur for the partition of 72 items of property held in common by eight people. The first respondent in the appeal was the plaintiff. A decree for partition was granted by the District Munsif who gave his decision on the claims of the parties to the various items of property. The appellant and the third respondent appealed to the Subordinate

* S. A. No. 921 of 1936. 4th March, 1940.

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Judge of Cuddapah. The Subordinate Judge set aside the allotments of the District Munsif and made fresh allotments. The appellant was dissatisfied with the Subordinate Judge's decision in so far as it related to items Nos. 29, 30, 31, 33, 37 and 38 of the properties and he filed the present appeal, which was placed before Gentle, J., on the question of admission. The learned Judge passed an order admitting the appeal only in respect of item No. 30.

In my opinion the learned Judge erred in admitting the appeal only in part. As he considered that there was a question which called for an answer he had no discretion in the matter in view of the wording of O. 41, rr. 11 and 12 (1). R. 11 says:

"(1) The appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred."

R. 12 (1) is in these words:

"Unless the appellate Court dismisses the appeal under r. 11, it shall fix a day for hearing the appeal."

By virtue of r. 11 the appellate Court may dismiss the appeal without serving notice on the respondent but if it does not dismiss the appeal summarily, it must, by virtue of r. 12 (1), fix a day for hearing "the appeal." There is nothing in either rule which suggests that the Court may admit the appeal in part.

This question has been raised before in this Court and also in the Calcutta, Bombay and Patna High Courts. It was raised apparently for the first time in the Calcutta High Court. In *Lukhi Narain Serowji* v. *Sri Ram Chandra Bhuiya*[1], a Bench of that Court held that it was not competent for a Court of Appeal to restrict the appeal to some specified grounds. Once the appeal is admitted all points in the memorandum are open to the appellant. This decision was affirmed in *Janaki Nath Hore* v. *Prabhasini Dasee*[2].

1. (1911) 15 C.W.N. 921. 2. (1915) I.L.R. 43 Cal. 178.

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A Full Bench of the Bombay High Court considered the matter in *Krishnaji Shrinivas* v. *Madhusa Appansa*[1]. The Court expressed agreement with the view of the Calcutta High Court in *Lukhi Narain Serowji* v. *Sri Ram Chandra Bhuiya*[2] and *Janaki Nath Hore* v. *Prabhasini Dasee*[3], that it was not open to a Judge to admit an appeal and at the same time to restrict the grounds on which it was to be heard, but it was of the opinion that if the appeal involved questions which were severable the Judge could dismiss the appeal in part and admit it in part under O. 41, r. 11:

"Just as at the final hearing, the Court may dismiss the appeal in part and allow it in part."

There is nothing in O. 41 which permits of severance and therefore I do not share this opinion. It may be desirable to provide for such a course but as the question has to be decided on the present wording of O. 41 in my judgment there are only two courses open to the Court, namely, to dismiss or admit the appeal as a whole.

In *Rekha Thakur* v. *Ramnandan Rai*[4], the Patna High Court saw no objection, if at the time when the appeal is admitted the Court is informed that the appeal will be confined to certain specified grounds only and that the other grounds are abandoned or if it is conceded on behalf of the appellant that grounds other than those specified are not fit to be urged in appeal, to the Court making a note of the fact. Making a note of the fact is quite a different thing from passing a substantive order. Relying on the Calcutta cases the Patna High Court held that an appeal cannot be admitted on a limited ground.

There are two decisions of this Court but neither has been reported. The first decision is *Nagalingam Chetti* v. *Pichu Chetty*[5]. There Seshagiri Aiyar and Kumaraswami Sastri, JJ., followed the decision in *Lukhi Narain Serowji* v. *Sri Ram Chandra Bhuiya*[2]. It was pointed out that the direction to the appellant to confine his arguments to particular points while placing him at a disadvantage was calculated to interfere with the prerogative of the Bench hearing the appeal and on principle the Court thought that the restriction was unsustainable. The second case is *Pyda Suryanarayanamurthi* v. *uVuppuloori*

1. (1933) I.L.R. 58 Bom. 406 (F.B.).
2. (1911) 15 C.W.N. 921.
3. (1915) I.L.R. 43 Cal. 178.
4 (1935) I.L.R. 15 Pat. 96.
5. S. A. No. 2198 of 1912.

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Kamayya Sastry[1], which was decided by Wadsworth, J. The learned Judge appears to have accepted the Bombay opinion that an appeal can be dismissed in part provided that there is an express order of dismissal in part. I have indicated that in my opinion this view is not justified by the terms of O. 41, rr. 11 and 12.

I hold that the appellant is not confined in his appeal to the question raised with regard to item No. 30 but is at liberty to challenge the decree on all the grounds mentioned in his memorandum of appeal.

The Subordinate Judge has omitted to deal with item No. 30 and it is agreed that the appellant is entitled to a one-third share in this piece of property and that the first respondent to a one-sixth share. The appeal, however, fails in respect of the other items. The appellant has omitted to print the whole of the record and from the parts of the record which he has printed he is unable to show that the Subordinate Judge erred in not giving him a greater share in those items. The first respondent has filed a memorandum of objections in respect of items Nos. 32, 34 and 47, but this must also be dismissed as the printed record does not provide material for supporting the objections. The result is that the decree of the Subordinate Court will be modified by granting the appellant a one-third share in item No. 30 and the first respondent a one-sixth share in it. The value of item No. 30 is only Rs. 2-4-0. The appellant has substantially failed and must therefore pay the costs of the third respondent. There will be no order as to costs on the memorandum of objections.

Mockett, J.

Mockett, J.—I agree.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I agree.

K.S. *Decree of the lower Court modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

V. Sreenivasachariar and another .. *Applicants**

v.

Krishniah Chetty and others .. *Respondents.*

Sreenivasachariar
v.
Krishniah Chetty.

Interest—Law of appropriation—Mortgage decree—Payment of portion of money without declaration—Decree-holder's right to appropriate moneys to

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1. S A. No. 1141 of 1934.

* Application No. 1147 of 1938 in C. S No. 42 of 1933. 4th September, 1939.

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his advantage—Decree debt recognised by the Madras Agriculturists' Debt Relief Act (IV of 1938), S. 9.

The law as to appropriation is clear. In the case of a decree debt upon a mortgage suit, as to the amount of principal it is the duty of the debtor to indicate when he makes a payment what his intention is, namely, whether the amount paid should first be appropriated towards principal or towards interest and then the balance towards the principal. If he omits to indicate his intention and there are no circumstances from which his intention can be inferred, he loses his right to have the amount appropriated in the manner he would like to have and the creditor has got the right to appropriate the amount in the manner best advantageous to him. Where there is no declaration by the creditor of his intention in what manner he appropriates and an appropriation is made, the law presumes that it has been made in the manner most advantageous to himself.

Venkatadri Appa Rao v. *Parthasarathy Appa Rao,* (1921) 40 M.L.J. 549: L.R. 48 I.A. 150: I.L.R. 44 Mad. 570 at 572 and 573 (P. C.), referred to.

Where therefore at the time of the payment by a debtor there is an amount due towards interest and the creditor, after appropriating the amount paid towards the total amount due to him towards interest and principal, claims the balance, he must be deemed to have appropriated the amount first in payment of interest and then in payment of the principal.

Het Rambodh Raj v. *Aya Ram-Tola Ram,* (1937) 47 L.W. 606 (P.C.), followed.

The Madras Agriculturists' Debt Relief Act does recognise a decree debt as a species of debt and it cannot be disputed that a decree is in law so. The word 'incurred' in S. 9 of the Act, as pointed by Varadachariar, J., in *Mottai Meera* v. *Abdul Kadhir Rowther,* (1939) 1 M.L.J. 528: I.L R. (1939) Mad. 525, is not confined only to contractual liabilities, but even to liabilities arising under a decree of Court.

Application No. 1147 of 1938 in Civil Suit No. 42 of 1933.

S. Panchapagesa Sastri and *U. C. Gopalan* for Applicants.

C. Venugopalachari and *T. A. Rangachari* for Respondents.

The Court delivered the following

JUDGMENT.—This is an application under the Madras Agriculturists' Relief Act (IV of 1938) and the two substantial reliefs prayed for are (1) that the sale of the property held in execution of the decree on 5th November, 1937, of lands forming Lot No. 2 of A schedule to the plaint be set aside and (2) that the mortgage debt be scaled down under the provisions of the Act and satisfaction of the debt entered up. So far as the sale is concerned, it is agreed that it should be set aside and I accordingly set it aside.

The main contest centred on the second relief to be given to the judgment-debtors under the Act. By an order dated 22nd September, 1938, the matter was referred to the Official Referee to report on the following matters:

(1) Whether the applicants are agriculturists within the meaning of the Act;

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(2) The debts and the dates on which they were incurred and the amount of principal and interest agreed;

(3) Amounts with dates of payments in respect of (*a*) principal and (*b*) interest; and

(4) Whether any amount is still outstanding, and, if so, how much in respect of principal and how much in respect of interest.

The Official Referee has submitted his report to the effect that the applicants are agriculturists within the meaning of the Act. His finding in regard thereto is not challenged. He has annexed a statement to his report giving the details called for. His finding as to the amount due on 1st October, 1937, is Rs. 4,490-5-0 for principal and the amount due with interest from 1st October, 1937, to 30th November, 1938, is Rs. 4,804-10-0. The decree-holder has not filed objections to the report of the Official Referee; but the judgment-debtors have. Before dealing with the contentions raised on their behalf it is necessary to state a few facts which are not in dispute. The suit was based on a mortgage dated 30th August, 1925, in favour of one M. A. Thirunarayanachariar. The principal amount secured thereunder was Rs. 7,500, the rate of interest being 9 per cent. per annum. Thirunarayanachariar assigned the deed of mortgage in favour of one Jagannadham Chettiar on the 3rd May, 1932. Jagannadham Chettiar filed a suit claiming a sum of Rs. 11,608 for principal and interest thereunder. A preliminary decree was passed by my learned brother Lakshmana Rao, J., declaring that the sum due and payable by the judgment-debtors on the 31st January, 1935, was Rs. 11,139-6-0 made up as follows: Rs. 7,500 the principal sum secured under the mortgage, Rs. 3,301-14-0 the interest due up to 31st July, 1934 and Rs. 337-8-0 the interest due up to 31st January, 1935. He directed the costs to be taxed and the amount taxed was found to be Rs. 1,515-8-0. He ordered and decreed that if the defendants failed to pay the sum of Rs. 11,139-6-0 and also the sum of Rs. 1,515-8-0 with interest at 6 per cent. per annum from the date of taxation on or before the 31st January, 1935, the plaintiff would be at liberty to apply for a final decree for the sale of the mortgaged properties and that on such application the mortgaged properties might be sold and the net proceeds applied in payment of the said sums together with subsequent interest at six per cent. per annum and such further costs as might be allowed to the plaintiff by the Court. The defendants committed default in

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the payment of the said amount as directed by the decree and a final decree was passed on 12th February, 1935. The plaintiff brought the properties to sale and the sale proclamation which was published on 3rd May, 1935, stated that there would be due under the decree on 9th August, 1935, a sum of Rs. 13,077-1-11 made up as follows: Rs. 11,139-6-0 the amount decreed, Rs. 1,515-8-0 the taxed costs, Rs. 422-3-11 interest on the amount decreed and costs at six per cent. per annum up to 9th August, 1935. Before the property was actually sold, at the instance of the judgment-debtors an order was passed by the Court giving leave to raise a sum of Rs. 8,500 on the mortgage of one of the properties, namely, house and ground No. 3, Singarachari Street, Triplicane. This order was passed on the 9th October, 1935, and in pursuance of the said order on the 14th November, the defendants executed a mortgage in favour of the United India Life Assurance Co., and thereby paid a sum of Rs. 8,500 to the plaintiff in part satisfaction of the amount due under the decree. On the 13th August, 1936, another sum of Rs. 500 was paid to the plaintiff under orders of Court. It was brought to the notice of the Court that on 19th June, 1936, the plaintiff herein had assigned the decree in favour of one Bysani Krishnayya Chetti and by an order dated 20th November, 1936, the said Bysani Krishnayya Chetti was brought on record as the transferee decree-holder. On the 16th April, 1937, the decree-holder entered part satisfaction of the decree and after doing so applied to bring the properties to sale for the balance still due to him. From the sale proclamation, which was published on the 16th September, 1937, it will be seen that after giving credit to the sum of Rs. 9,000 already paid as aforesaid, the decree-holder claimed Rs. 4,725-4-0 as the balance that would be due and payable to him on the 4th November, 1937. The contention of the defendants is that the sum of Rs. 9,000 paid by them should be adjusted as follows in accordance with the provisions of the Act, namely, Rs. 1,515-8-0 towards the costs of suit and the balance of Rs. 7,484-8-0 towards the principal and the debt if so scaled down will be found to be completely discharged. The contention of the decree-holder, which has been accepted by the Official Referee, is that that the sum of Rs. 9,000 has been adjusted by him first towards the costs of suit, secondly, towards all interest which accrued up to September, 1936, and the balance that remained after such appropriation was appropriated to the principal amount, and it

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was after making such appropriation the claim of Rs. 4,725-4-0 as being due to him in the proclamation of sale was made. He therefore contends that all interest until September, 1936, was paid off and what remained outstanding on the 1st October, 1937, was only the interest from September, 1936, to 1st October, 1937, which only could be wiped out if the provisions of the Act are applicable; and if the interest is so wiped out according to him, the balance due under the decree would be Rs. 4,500 or thereabouts. As already stated the finding of the Official Referee is that the amount of the principal due on the 1st October, 1937, is the sum of Rs. 4,490-5-0. The decree-holder has also raised an alternative contention that the provisions of S. 8 of the Act are not applicable to the case and that if at all S. 9 only would apply. Apart from the provisions of the Act it seems to me that the contention of the decree-holder in regard to the appropriation of moneys paid by the judgment-debtors in the manner alleged is well-founded and if at all what was outstanding on the 1st October, 1937, was the interest due and payable from September, 1936, to 1st October, 1937. But Mr. Panchapakesa Sastri contends that there is nothing to indicate that the decree-holder has appropriated the amounts towards interest since he credited the amounts paid towards the total amount due without indicating whether the amounts paid were appropriated towards principal or interest and the defendants are entitled now to fall back upon the provisions of the Act and contend that interest must still be deemed to be outstanding within the meaning of S. 8 of the Act and the provisions of the Act must be given effect to. The question here is whether there has been a valid appropriation by the decree-holder as contended for by him. The law as to appropriation is clear. In the case of a debt of the nature in question, it is the duty of the debtor to indicate when he makes a payment what his intention is, namely, whether the amount paid should first be appropriated towards principal or towards interest and then the balance towards the principal. If he omits to indicate his intention and there are no circumstances from which his intention can be inferred, he loses his right to have the amount appropriated in the manner he would like to have and the creditor has got the right to appropriate the amount in the manner best advantageous to him; he can either appropriate the amount towards interest in the first instance and the balance towards the principal or the entire amount towards

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the principal. But when there is no declaration by the creditor of his intention in what manner he appropriates and an appropriation is made, the law presumes that it has been made in the manner most advantageous to himself. In *Venkatadri Appa Rao* v. *Parthasarathy Appa Rao*[1], their Lordships of the Judicial Committee at page 573 lay down the rule thus:

"There is a debt due that carries interest. There are moneys that are received without a definite appropriation on the one side or on the other, and the rule which is well established in ordinary cases is that in those circumstances the money is first applied in payment of interest and then when that is satisfied, in payment of the capital."

As further pointed out by them citing a passage from the judgment of Lord Justice Rigby in the case of *Parr's Banking Co.* v. *Yates*[2], "that rule where it is applicable, is only common justice." In *Venkatadri Appa Rao* v. *Parthasarathy Appa Rao*[1] the facts were as follows: The suit was for partition of a certain estate, the plaintiff claiming a third share therein. He was declared entitled to that share by the High Court. There was an appeal to the Privy Council from that decree by the adverse claimants. Pending the decision of the Privy Council in pursuance of the order of the High Court the plaintiff drew various sums of money appertaining to his share from the receiver appointed by the Court. The Privy Council reversed the decree of the High Court and in consequence the plaintiff became obliged to restore the moneys he had received and there was an order for restitution with interest by the Court. Various sums were paid by the plaintiff in pursuance of the order without indicating whether it was for interest or for principal. The successful claimants who received the moneys did not expressly declare whether they were appropriating the same for interest or for the principal, but they made out an account showing how they appropriated it by crediting the sums paid with interest thereon and striking out the balance due. It was contended that as each sum paid by the plaintiff was charged with interest by the claimants it must be deemed that money was appropriated by them towards the principal and it was not open to them to contend that they appropriated the moneys paid first towards interest and then towards the principal. The High Court acceded to the contention, but it was negatived by their Lordships of the Privy Council and the following remarks of theirs

1. (1921) 40 M.L.J. 549: L.R. 48 I.A. 150: I.L.R. 44 Mad. 570 (P.C.).
2. (1898) 2 Q.B. 460 at 466.

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are instructive:

"The reason given by the learned Judges for their judgment was that they regarded the payments already made as shown in an account filed by the defendants in the District Court on the 25th August, 1915, as payments that had in fact been appropriated by the defendants as against principal and that from such appropriation there was no opportunity for them to recede. The account referred to is set out in the record in these proceedings and it shows that as each sum of money was received it was charged with interest at the rate of 9 per cent. and carried forward until the end of the year, when the total amount so found was credited as against the total amount which was due. At no time did the sums so credited do more than cover the claim for interest, and it therefore seems impossible to understand why it was that the money received was regarded as definitely appropriated in respect of the principal" (pages 572 and 573).

Where therefore at the time of the payment by a debtor there is an amount due towards interest and the creditor after appropriating the amount paid towards the total amount due to him towards interest and principal, claims the balance, he must be deemed to have appropriated the amount first in payment of interest and then in payment of the principal. A recent decision of their Lordships of the Privy Council reported in *Het Rambodh Raj* v. *Aya Ram-Tola Ram*[1] lends support to this view. In that case during the course of execution of a decree there was a compromise between the decree-holder and the judgment-debtor, which was recorded under O. 21, r. 2 and S. 47, Civil Procedure Code. Under the terms of the compromise it was found that the principal amount due and payable under the decree was Rs. 84,000 that interest due thereon was Rs. 24,400 and costs of execution Rs. 307-6-9, in all, a total sum of Rs. 1,08,707-6-9. The judgment-debtor paid a sum of Rs. 8,000 and the balance that was found due and payable under the compromise was fixed at Rs. 1,00,707-6-9 and this sum was agreed to be paid in seven instalments with a certain rate of interest on the principal sum. Two instalments were paid under the compromise and the third instalment with interest was not paid. Thereupon the decree-holders applied for execution. One of the contentions raised by the judgment-debtor was that the decree was barred by limitation. In answer thereto the decree-holder relied upon a payment of Rs. 825 made on a prior date, namely, 15th February, 1929. If that payment was taken to be one for interest as such within the meaning of S. 20 of the Limitation Act, the execution application would not be barred by limitation.

1. (1937) 47 L.W. 606 (P.C.).

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In dealing with this question their Lordships observed as follows:—

"The payment was made and necessarily made in respect of principal and interest. It was therefore a payment of interest on a debt as such by the person liable to pay the debt. There could be little doubt in view of the many subsequent payments that a fresh period of limitation could if necessary be shown to start at a much later date—but a period commencing on the 15th February, 1929, is sufficient to cover the present application."

The application was not therefore barred by limitation. This case is therefore an authority for the position that where principal and interest is due and a payment is made by a debtor without indicating whether it is for interest or for principal it must be deemed to be a payment towards interest as such. It follows that when appropriation in such circumstances is made by a creditor and a balance is claimed, it must be taken that he has appropriated the payment made first towards interest and then towards the principal. If this principle is applied there can be no question that the contention of the decree-holder is well founded. It cannot be denied that an appropriation has been made by the decree-holder because it is only the balance after appropriation that has been claimed; and he has also entered part satisfaction of the decree which means that the debt to the extent mentioned in the application for satisfaction has been wiped out. Mr. Panchapakesa Sastri contended that in such circumstances the amount paid should at least be appropriated proportionately towards principal and interest but he has not been able to cite any authority in support of his contention.

The alternative contention raised on behalf of the decree-holder relates to the non-applicability of S. 8 of the Act to the present case. His contention is that the decree having been passed after 1st October, 1937, it is governed by S. 9 of the Act and that principal sum within the meaning of the Act is the sum of Rs. 11,000 and odd. There is a good deal of force in the contention advanced. The Act does recognise a decree debt as a species of debt and it cannot be disputed that a decree debt is in law so. A debt of record has always been considered to be the highest form of debt on which under the old English law an action of debt was maintained. (Vide *Hodsoll* v. *Baxter*[1].) Even now if the debt is evidenced by a foreign judgment an action is maintainable thereon. Cl. (iii) of S. 3 of the Act clearly says that debt means any "liability in cash or

1. (1858) Ellis, Blackburn and Ellis 884: 120 E.R. 739.

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kind, whether secured or unsecured, due from an agriculturist, whether payable under a decree or order of a civil or revenue court". S. 7 relates to all debts including decree debts. The word 'incurred' in S. 9 of the Act, as pointed out by Varadachariar, J., in *Mottai Meera* v. *Abdul Kadhir Rowther*[1] is not confined only to contractual liabilities but even to liabilities arising under a decree of Court. Where the Court consolidates both principal and interest up to the date of the decree and awards interest thereon, as it usually happens in the case of mortgage decrees, it may be contended that the aggregate of the principal and interest is the principal payable under the decree but in view of the fact that the decree-holder not having objected to the finding of the learned Official Referee has accepted the figure as arrived at by him, I do not think it necessary to go into this question. I must remark that contentions like the one advanced are rendered possible by the language of the various provisions of the Act. The Act is one of the most ill-drafted enactments now existing on the statute book. Every section bristles with difficulties and it is no wonder that the Act has become a fruitful source of litigation.

In the result the report of the Official Referee is confirmed and the decree-holder is given leave to proceed with the execution for the amount of Rs. 4,804-10-0 as found by the Official Referee as due on 30th November, 1938 and subsequent interest. As regards costs I think the plaintiff is entitled to the costs of the proceedings before the Official Referee and before me, which I fix at Rs. 200.

K. C. ——— *Referee's order confirmed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE LAKSHMANA RAO.

Penubala Muni Krishnayya .. *Petitioner** (*Respondent*)

v.

Penubala Akilamma .. *Respondent* (*Petitioner*).

Muni Krishnayya v. Akilamma.

Criminal Procedure Code (V of 1898), S. 488 (3)—Sentence of imprisonment—Whether subsequent order passed under S. 23 (1), Provincial Insolvency Act (V of 1920) can affect the sentence—Whether Magistrate can cancel the previous sentence.

It is not possible for a Magistrate who has passed a sentence of imprisonment under S. 488 (3) of the Criminal Procedure Code to cancel the sentence of imprisonment, merely because the Insolvency Court has issued an order

1. (1939) 1 M L.J. 528: I.L.R. (1939) Mad. 525.

*Crl.R.C.No. 966 of 1939. 24th January, 1940.
Crl.R.P. No. 913 of 1939

of protection. The sentence of imprisonment is a punishment inflicted for breach of the order. It cannot be considered in the terms of S. 23 of the Provincial Insolvency Act that a person who has been sentenced under S. 488 (3) is under 'imprisonment in execution of the decree of any court for the payment of money.'

Maung Tin v. *Ma Hmin*, (1933) I.L.R 11 Rang. 226 (F. B.) and *Mahomed Ali Mithabhai*, In re, A.I.R. 1930 Bom 144, relied on.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Chandragiri division dated 29th October, 1939 and made in M.C. No. 104 of 1938.

N. Rangachari for Petitioner.

Respondent not represented.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Order of the Court was pronounced by

Burn, J.

Burn, J.—This is an application to revise the order passed by the learned Sub-Divisional Magistrate of Chandragiri on the 29th October, 1939, on an application made to him on the 28th October, 1939, on behalf of the petitioner. The petitioner is the husband of a woman named Akkulamma in whose favour the learned Joint Magistrate passed an order in M.C. No. 104 of 1938 on the 7th February, 1939, directing this petitioner to pay his wife Rs. 3-8-0 per mensem as maintenance under S. 488, Criminal Procedure Code. The petitioner did not pay in accordance with that order. Before she could enforce the order, the petitioner filed a suit O.S. No. 128 of 1939 in the Court of the District Munsif of Tirupati and obtained an interim injunction restraining his wife from enforcing the order for maintenance. The injunction was in force until 21st July, 1939. On that date, the interim injunction was vacated and the petitioner's wife on the 24th July, 1939, applied to the Joint Magistrate to direct this petitioner to pay Rs. 17-8-0 being the arrears for five months. The learned Joint Magistrate issued a distress warrant and as the money was not realised, he gave notice to the petitioner who appeared before him. The Magistrate found that he had without sufficient cause failed to pay the money due to his wife under the maintenance order. The Magistrate, therefore, sentenced him to suffer rigorous imprisonment for one month, or until the amount of the arrears should sooner be paid. This order was passed on the 23rd October, 1939. On the 24th October, the petitioner filed an insolvency petition in the Court of the District Munsif and obtained from him an

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order for his release under S. 23 (1) of the Provincial Insolvency Act. The District Munsif communicated a copy of this order to the Joint Magistrate with a letter dated 25th October and the petitioner made an application on the 28th October for his release. The learned Joint Magistrate dismissed his application for release and this revision petition has consequently been brought.

The contention on behalf of the petitioner is that the protection order passed by the Insolvency Court is a decision of a competent Civil Court within the meaning of S. 489 (2), Criminal Procedure Code, in consequence of which the Joint Magistrate is compelled to cancel the sentence of imprisonment passed upon this petitioner. There is no authority for this contention. Learned Counsel for the petitioner has referred us to the cases reported in *Tokee Bibi* v. *Abdool Khan*[1] and *Halfhide* v. *Halfhide*[2]. But we do not think that they have any application. In the earlier case there was no sentence of imprisonment passed at all. In the second case, the protection order had been issued before the sentence of imprisonment was passed, and after the sentence of imprisonment was passed, an adjudication order had been passed and the protection order continued until discharge. Their Lordships of the Calcutta High Court said:

"In our opinion, the fact that he has been adjudicated an insolvent is conclusive, so long as the order of adjudication stands, that the petitioner is unable to pay his debts. There is also the order of protection. It follows, therefore, that the petitioner being unable to pay his debts, is not guilty of wilful neglect within the meaning of S. 488, Criminal Procedure Code."

It is noticeable that there was also no finding by the Magistrate of wilful neglect in that case. The terms of S. 488 (3) have since been altered. There is no question now of 'wilful neglect.' The section reads:—

"If any person so ordered *fails without sufficient cause* to comply with the order, any such Magistrate may, for every breach of the order.......... sentence such person...........to imprisonment."

This wording shows that in every case it is the duty of the Magistrate to find out whether the person ordered to pay maintenance under S. 488 has or has not failed without sufficient cause to comply with the order. Neither the protection order nor the adjudication order could be conclusive on this point. The question is one of fact which the Magistrate has to decide

1. (1879) I.L.R. 5 Cal. 536. 2. (1923) I.L.R. 50 Cal. 867.

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for himself. *Prima facie*, of course, it would appear to a Magistrate that an order of protection or an order of adjudication would be sufficient to show that failure to comply with an order to pay maintenance had not been without sufficient cause, but it cannot be said that the Magistrate's hands would be tied by the order of the Insolvency Court. Learned Counsel for the petitioner has referred us to the decision of Mr. Justice Wadsworth reported in *Yahia*, In re[1]. That has no bearing upon the point before us. The learned Judge has held that arrears of maintenance payable in respect of magisterial order under S. 488, Criminal Procedure Code, constituted a 'debt or liability provable in insolvency' within the meaning of S. 46 (3) of the Presidency Towns Insolvency Act. The learned Judge has not anywhere suggested that a protection order issued by an Insolvency Court would necessarily be conclusive for a Magistrate making an inquiry under S. 488 (3), Criminal Procedure Code. The matter has been dealt with very clearly by Mr. Justice Allsop of the Allahabad High Court in the case reported in *Shyama Charan* v. *Angūri Devi*[2]. The learned Judge has said:

"It has also been urged that the mere fact that the applicant has been adjudicated an insolvent shows that he is unable to pay for the maintenance of his wife and that that constitutes sufficient cause for non-payment. Here again I am unable to agree. Learned Counsel has suggested that the whole of the insolvent's property vests in the receiver and there is nothing left out of which he can maintain his wife. This argument overlooks the fact that the property of the insolvent which vests in the receiver does not include any property which is exempted by the Code of Civil Procedure, 1908, from liability to attachment and sale in execution of a decree. Under the provisions of S. 60, Civil Procedure Code, as now enacted the salary to the extent of the first hundred rupees and one half of the remainder of such salary is exempt from attachment. The applicant would therefore, if he is prepared to do work and earn a salary, be in a position to support his wife."

The learned Judge has also pointed out that:

"An order passed by a Magistrate under S. 488 (3), Criminal Procedure Code, for the imprisonment of a person who fails to pay a maintenance allowance is a sentence of imprisonment"

That is the word used in the Code itself. The learned Public Prosecutor has contended with much force that the Magistrate who has passed such a sentence has no power to cancel his own order. Learned Counsel for the petitioner has discussed the question whether a proceeding under S. 488 is 'a criminal case' or not. But we think that that is not a relevant

1. (1936) 71 M.L.J. 431.
2. I.L.R. (1938) All. 486.

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discussion. It appears to us that the orders referred to in S. 489 (2) which the Magistrate can cancel or vary are orders relating to the amount of maintenance payable. We do not think that it is possible for a Magistrate who has passed a sentence of imprisonment under S. 488 (3) to cancel the sentence merely because the Insolvency Court has issued an order of protection. The sentence of imprisonment is a punishment inflicted for breach of the order. It cannot be considered in the terms of S. 23 of the Provincial Insolvency Act that a person who has been sentenced under S. 488 (3) is under 'imprisonment in execution of the decree of any court for the payment of money'. This view derives support from the decisions in *Mehr Khan* v. *Mst. Bakht Bhari*[1], *Maung Tin* v. *Ma Hmin*[2] and *Mahomed Ali Mithabhai*, In re[3]. In the last case, it was held that a wife could make an application for maintenance under S. 488, Criminal Procedure Code in spite of the fact that she had already obtained a decree in the Civil Court for maintenance, payments under which were suspended by her husband who had filed an insolvency petition. Moreover even discharge of an insolvent does not free him from liability to obey an order under S. 488, Criminal Procedure Code. [*Vide* S. 44 (1) (*d*) of the Provincial Insolvency Act.]

For these reasons, we think that the order of the learned Magistrate is correct and this revision petition is dismissed. The petitioner must surrender to his bail to serve out the remainder of the period of imprisonment to which he has been sentenced.

K. C. ——— *Revision Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Madina Bibi Sahiba .. *Appellant** (*1st Defendant*)

v.

The Ismail Durga Association through its present Secretary Haji Mohammad Moulana Sahib and another .. *Respondents* (*Plaintiff and 2nd Defendant*).

Madina Bibi Sahiba v. Ismail Durga Association.

Transfer of Property Act (IV of 1882), S. 53—Suit for setting aside alienation made with intent to defeat or delay creditors—Necessity to file suit in representative capacity under Civil Procedure Code, O. 1, r. 8.

1. (1928) I.L.R. 10 Lah. 406.
2. (1933) I.L.R. 11 Rang. 226.
3. A.I.R. 1930 Bom. 144.

*Appeal No. 188 of 1937. 29th February, 1940.

Madina Bibi Sahiba *v.* Ismail Durga Association.

Where an association got money decrees and in execution attached properties and was successfully objected to by the respondent under a sale-deed in his favour of the same properties and thereupon the association filed a suit, as a result of the removal of their attachment, for a declaration that the deed of sale in favour of the respondent was executed in fraud of creditors 'nominally and colourably', but the association did not apply for an order under the provisions of O. 1, r. 8 of the Civil Procedure Code (V of 1908) permitting it to sue on behalf of all the creditors,

Held, that it was necessary for the association to sue in a representative capacity and that, not having done so, the suit should fail.

As the suit admittedly is one of the nature contemplated by S. 53 of the Transfer of Property Act, surely the provisions of that section must be applied, especially as there is nothing in the section incompatible with O. 21, r. 63 of the Code of Civil Procedure. S. 53 does not take away from the disappointed decree-holder the right to sue. His right to sue is left unaffected. All that the section says is that he must sue on behalf of all the creditors, not for himself alone, and this implies no hardship.

Case-law reviewed.

Appeal against the decree of the Court of the Subordinate Judge of Madura in O. S. No. 31 of 1936.

K. V. Srinivasa Aiyar for Appellant.

K. Bashyam and *V. Minakshisundaram* for Respondents.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—The appellant is the wife of the second respondent. In 1931 the respondent association obtained two money decrees against the second respondent for an aggregate sum of Rs. 894. In 1934, in execution of these decrees the association attached five houses in Madura as property belonging to the judgment-debtor. The appellant objected to the attachment and her objection was successful. The appellant claimed title to the houses and other properties under a deed of sale executed in her favour by her husband on the 16th of September, 1932. As the result of the removal of the attachment the association filed in the Court of the Subordinate Judge of Madura the suit out of which this appeal arises for a declaration that the deed of sale was executed in fraud of creditors "nominally and colourably". In the meantime the second respondent had been adjudicated an insolvent and permission of the Official Receiver was sought, and granted, for the institution of the suit. The association, however, did not apply for an order under the provisions of O. 1, r. 8 of the Code of Civil Procedure permitting it to sue on behalf of all the creditors and in spite of objection proceeded with the suit for

Leach, C.J.

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its own benefit and not for the benefit of the creditors generally. The association based its claim for the relief on two grounds. In the first place it said that the transaction was a sham and in the second place that the transfer was a fraudulent transaction, entered into with a view to defeat and delay the creditors. The alleged consideration for the sale-deed was a sum of Rs. 10,000. The Subordinate Judge held that the transaction was not a nominal one as the appellant had given consideration to the extent of Rs. 8,000, but he considered that the transaction constituted a fraud on the creditors as the properties were worth Rs. 18,000. In accordance with this finding he granted the association a declaration that the sale-deed was invalid, being a fraud on the creditors, and directed that it be annulled. He also vacated the order passed in favour of the appellant in the execution proceedings, but allowed her to rank as a creditor of her husband to the extent of the Rs. 8,000 which she had paid.

The appellant has persisted in her contention that the suit as framed did not lie and she disputes the finding of the Subordinate Judge that the transaction was a fraud on the creditors. If her first contention is sound, it will not be necessary for the Court to consider the merits of the case. The appellant says that it was incumbent upon the association to sue on behalf of itself and all the other creditors of the second respondent and relies on the provisions of S. 53 of the Transfer of Property Act. That section says that every transfer of immovable property, made with intent to defeat or delay the creditors of the transferor, shall be voidable at the option of any creditor so defeated or delayed. By the Transfer of Property (Amendment) Act, 1929, the following provision was added to the section:—

"A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors."

The appellant says that as this provision has not been complied with the suit must fail. On the other hand the association says that O. 21, r. 63 of the Code of Civil Procedure gives to a decree-holder whose attachment has been disallowed the right to have the question decided by suit and the rule must be read entirely independent of the provisions of S. 53 of the Transfer of Property Act.

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The suit clearly falls within the purview of S. 53 of the Transfer of Property Act. It is not a suit merely for a declaration that the transaction is a bogus one but a suit in which the association also seeks to have the transaction set aside on the footing that it is a fraud on the creditors. The association accepts this, and does not challenge the finding of the Subordinate Judge that consideration passed from the wife to the husband to the extent of Rs. 8,000. As the suit admittedly falls within S. 53, it can only be maintained if the association has obtained the permission of the Court under O. 1, r. 8 of the Code of Civil Procedure to sue on behalf of all the creditors. The words "on behalf of, or for the benefit of, all the creditors" in S. 53 of the Transfer of Property Act are taken from O. 1, r. 8 of the Code of Civil Procedure, which provides that where there are numerous persons having the same interest in one suit, one or more of them may, with the permission of the Court, sue or be sued, or defend on behalf of or for the benefit of all persons interested. If a suit has to be brought in a representative capacity, it can only be maintained when it has been instituted in compliance with the provisions of this rule. This was laid down by the Privy Council in *Kumaravelu Chettiar* v. *Ramaswami Aiyar*[1].

Before S. 53 of the Transfer of Property Act was amended, there was a conflict in India on the question whether a decree-holder, who was compelled to file a suit as the result of a successful objection to the attachment, was compelled to sue on behalf of himself and all the other creditors. This Court was of opinion that it was not necessary for him to sue in a representative capacity. (See *Pokker* v. *Kunhamad*[2] and *Ramaswami Chettiar* v. *Mallappa Reddiar*[3].) The decision in the latter case was that of a Full Bench. The Calcutta and the Bombay High Courts were of the opinion that it was necessary for the plaintiff to sue in a representative capacity. (See *Hakim Lal* v. *Mooshahar Sahu*[4].) The decisions of this Court and that of the Calcutta High Court arose out of suits which followed unsuccessful proceedings in execution. The Bombay cases are *Burjorji Dorabji Patel* v. *Dhunbai*[5] and *Ishvar Timappa* v.

1. (1933) 65 M.L.J. 87 : L.R. 60 I.A. 278 : I.L.R. 56 Mad. 657 (P.C.).
2. (1918) 36 M.L.J. 231 : I.L.R. 42 Mad. 143.
3. (1920) 39 M.L.J. 350 : I.L.R. 43 Mad. 760 (F.B.).
4. (1907) I.L.R. 34 Cal. 999.
5. (1891) I.L.R. 16 Bom. 1.

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Devar Venkappa[1]. These cases did not arise directly out of execution proceedings, but the Court indicated that a suit of the nature of the present one should be brought in a representative capacity. It seems to me that the amendment of S. 53 of the Transfer of Property Act by the insertion of the provision that a suit instituted by a creditor shall be instituted on behalf of, or for the benefit of, all the creditors must have been intended to put an end to this controversy. The words in brackets "which term includes a decree-holder whether he has or has not applied for execution of his decree" which follow the word "creditor" in the section, in my opinion, makes this clear. If this is the case the association is clearly out of Court.

But even if the question had to be decided on the reading of S. 53, without taking into consideration what has gone before, it would still be difficult to accept the association's argument. As the suit admittedly is one of the nature contemplated by S. 53 of the Transfer of Property Act surely the provisions of that section must be applied, especially as there is nothing in the section incompatible with O. 21, r. 63 of the Code of Civil Procedure. S. 53 does not take away from the disappointed decree-holder the right to sue. His right to sue is left unaffected. All the section says is that he must sue on behalf of all the creditors, not for himself alone, and this implies no hardship. If the suit is successful and the judgment-debtor has not become insolvent, he has still the right to attach the property. If the judgment-debtor has become insolvent, then the right to attach is gone entirely and the decree-holder can only look to the Insolvency Court for payment. The requirement of S. 53 saves the filing of unnecessary suits and saves the judgment-debtor from being harassed by other creditors. I hold that it was necessary for the association to sue in a representative capacity and that, not having done so, the suit must fail. The same view of the law has been taken by the Calcutta High Court in *Ekkari Ghose* v. *Sidheswar Ghose*[2] and by the Rangoon High Court in *A. K. A. C. T. V. Chettiar* v. *R. M. A. R. S. Firm*[3], *Maung Tun Thein* v. *Maung Sin*[4] and *Asgar Ali* v. *C. V. R. M. Firm*[5].

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1. (1902) I.L.R. 27 Bom. 146.
2. (1935) 62 C.L.J 548.
3. (1934) I.L.R. 12 Rang. 666.
4. (1934) I.L.R. 12 Rang. 670.
5. (1935) I.L.R. 14 Rang. 81.

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Mr. Bashyam has asked that the association be allowed to amend the plaint and turn the suit into a representative one. In support of this application Mr. Bashyam has pointed to the fact that before the suit was instituted the association had obtained leave from the Official Receiver and the leave was conditional on the association depositing in Court to the credit of the insolvent's estate any amount realised by him as the result of the suit. Mr. Bashyam has also pointed out that the declaration asked for was a declaration that the disputed transaction was a fraud on the creditors. If the failure to sue in a representative capacity was the result of oversight, the Court might have been disposed in these circumstances to allow the amendment, but that is not the case. The appellant in her written statement raised this very question and an issue was framed on it. The association preferred to contest the validity of the appellant's averment and succeeded in the argument before the Subordinate Judge. Having gone to trial on this issue, it is now far too late in the day for the association to ask for leave to amend. It would be opposed to principle and accepted authority to allow the amendment. The course which the association should have adopted when the question was raised was to apply to the Court for permission to sue on behalf of all the creditors. This the association did not do and it has only itself to blame for the failure of the suit.

The appeal will be allowed with costs in this Court and below.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.:—I agree.

K. C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

C. Jayaram Mudaliar .. *Appellant** (*Plaintiff*)

v.

Lakshmi Ammal .. *Respondent* (*Defendant*).

Jayaram Mudaliar v. Lakshmi Ammal.

Husband and wife—Suit for restitution of conjugal rights—Suit by husband who had nothing to do with his wife for 20 years after marriage—Plaintiff rejecting prior offer by wife to join him—Discretion of Court to refuse decree for restitution.

Where the husband who sued for restitution of conjugal rights has had nothing to do with his wife for 20 years after his marriage, and at least 13

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*C.C.C. A. No. 27 of 1938. 26th March, 1940.

Jayaram Mudaliar *v.* Lakshmi Ammal.

years after she attained puberty and had definitely rejected the last offer made by the wife through a family friend to join him,

Held, the Court was justified in refusing the plaintiff a decree for restitution in the exercise of its discretion.

Case-law examined.

Appeal against the decree of the Principal Judge, City Civil Court, Madras dated 29th November, 1937 and passed in O. S. No. 504 of 1936.

T. K. Rangaswami Aiyangar for Appellant.

P. Krishnamachari for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit filed by a husband against his wife for the restitution of conjugal rights. The parties are Hindus and Mudaliars. The undisputed facts are these. The marriage took place in June, 1916, when defendant was nine years old. It was brought about largely by an elderly relative of both parties named Ponnambala, who also executed a will making provisions in favour of both parties to take effect on the death of his widow. About 1921 when Ponnambala was dead and defendant had not yet attained puberty, plaintiff married a second wife, also then an immature girl. She was his sister's daughter. She attained her puberty within a few months, and ever since has lived with the plaintiff. Defendant attained puberty in 1922 or 1923, but continued to live with her parents. In 1926 occurred the only correspondence between the parties or their families until shortly before the suit. Plaintiff wrote to both defendant and defendant's father complaining that defendant had not been sent to him, and calling upon her father to bring her on one or two auspicious days, threatening legal proceedings if they refused. Defendant's father replied expressing his anxiety that defendant's married life with plaintiff should begin, but pointing out that according to custom it was plaintiff's duty to come to him and have the nuptial ceremony performed in his house. Nothing further was communicated by plaintiff. In 1927 defendant's father died. In May, 1936, Ponnambala's widow died, and plaintiff took possession of certain property under plaintiff's will. On May 22, a lawyer's notice was sent to him on behalf of defendant calling upon him to vacate the property, which defendant claimed was hers under the terms of the will. Within four days of the receipt of this notice plaintiff replied by a lawyer's notice

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demanding that defendant should come and live with him, and he followed up this notice in July by filing the present suit.

These are the undisputed facts. The case, as put forward by plaintiff, was that his second marriage was undertaken by him owing to the delay in defendant's attainment of puberty. Defendant's father was so angered by this conduct that he called a caste meeting which resolved that the members of the caste should henceforward dissociate themselves from plaintiff because he had married his sister's daughter. Defendant's family failed in their duty to inform him of defendant's puberty and to bring defendant to his house. It was impossible for him, even if it had been otherwise customary, to go to defendant's house owing to his bitter resentment at defendant's father's actions. Not only in 1926 but on other subsequent occasions plaintiff attempted through various messengers to persuade defendant's people to send her, but they refused.

The learned City Civil Judge dismissed the suit. He held that plaintiff's original intention was to marry only his second wife. He was persuaded by Ponnambala to marry defendant, but after Ponnambala died he had no intention whatever of treating her as his wife. Plaintiff's letters in 1926 were cold and formal, and were written by him in the certain knowledge that his proposals would be rejected. The other alleged attempts to secure the company of defendant have not been proved and did not take place. On the other hand plaintiff deliberately rejected overtures made in about 1930 by defendant's family through D. W. 2 that he should arrange to fetch her. The suit has been filed, not because plaintiff really wanted the society of his wife, but in order to overcome her opposition to the claims which he put forward under Ponnambala's will. The granting of a decree in a suit of this kind is an equitable relief, and as plaintiff has neglected his wife for this long period, and has brought his suit for the sole purpose just mentioned he is not entitled to such relief.

In the appeal arguments the findings of fact on the question of plaintiff's attitude are contested, and the case for plaintiff put in this form. It is the wife's duty to join the husband. Normally in the caste of the parties the nuptial ceremony is performed in the husband's house. Plaintiff may have been obstinate in insisting upon this condition, but in view of defendant's father taking the lead in virtually excommunicating

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him he could not reasonably be expected to submit to the indignity of approaching him first. In any case defendant is as obstinate as the plaintiff and the delay is as much due to her as to him. There is no fear of physical violence or cruelty. Plaintiff's immediate motive for filing the suit is admitted, but it is not necessarily a sordid motive. It may well be to the advantage of both parties to settle their disputes in regard to Ponnambala's will by a general reconciliation.

The foundation of fact upon which this argument must rest is threefold:

(*i*) The truth of the caste meeting and its resolution.

(*ii*) The truth of the assertion that the wife's people must bring the wife to the husband.

(*iii*) The truth of plaintiff's case that he has made repeated efforts to secure the company of his wife.

The learned City Civil Judge has discussed all these points in detail. On the first question he shows how the caste meeting is not referred to in plaintiff's letters in 1926, and how meagre the evidence is which was adduced in its support. Only one witness (P. W. 4) was cited to corroborate plaintiff in this matter. The learned Judge says he was 'not impressed with this witness' and points out that even he says that the resolution was not put into force and was rescinded in 1931. The learned Judge is clearly right in holding that if ever such a meeting were held there ought to have been ample evidence to prove it.

On the second point the evidence of plaintiff's own witness is clear that the nuptial ceremony may take place in the house of either party, and P. W. 2 admits that in the case of defendant's four sisters all the nuptial ceremonies took place in defendant's father's house. The learned Judge also finds that, if the ceremony is to take place in the husband's house, though it may not be necessary for the husband himself to fetch his bride he should send some relations or friends ceremonially to do so and this plaintiff entirely omitted to arrange for. That finding was not seriously challenged in the arguments.

On the third point the learned Judge has given good reasons for rejecting plaintiff's explanation that the second marriage was due to his sexual impatience. He contrasts the legal formalism of plaintiff's letters in 1926 with the cordial terms in which defendant's father replies, and in paragraph 14

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of his judgment shows how the evidence entirely fails to establish that plaintiff made any other attempts to get his wife. I have been taken through the whole evidence in the case and can see no reason to differ from the learned Judge's final conclusion that at no time did plaintiff really want his wife's society. It must also be remembered in this connection that defendant's father died in 1927, so that plaintiff's chief difficulty (according to his own contention) was removed nine years before the suit was filed and that according to the evidence of D. W. 2 which the learned Judge accepts, plaintiff refused in or about 1930 to take the necessary measures to get his wife.

The question then arises whether on this view of the facts the learned Judge made a right use of his discretion in refusing plaintiff a decree. It is not seriously disputed that this relief is discretionary. Whatever may have been said a generation or more ago (see *Dadaji Bhikaji* v. *Rukmabai*[1], *Purushotamdas Maneklal* v. *Bai Mani*[2]) it is now well established (see *Bai Jivi* v. *Narsingh Lalbhai*[3], *Ude Singh* v. *Mst. Daulat Kaur*[4], *Rukmani Ammal* v. *T. R. S. Chari*[5]) that this discretion can and should be exercised by a Court. There have been two cases in Lahore, cases, no doubt, in which the parties were Muhammadans, where the failure of a husband to send for his wife for two and three years respectively after her puberty has entailed the dismissal of his suit (see *Mt. Nawab Bibi* v. *Allah Ditta*[6]; *Imam Baksh* v. *Mt. Amiran*[7].) In *Bai Jivi* v. *Narsingh Lalbhai*[3] the learned Judges say,

"In the absence of legislation it appears, therefore, on the whole that the Court's desire to consider the entire conduct of the parties so as to be able to judge whether the plaintiff deserves at the hands of the Court the relief which he seeks, and whether such a relief is not unreasonable in the particular case against the defendant", (at p. 341.)

In *Ude Singh* v. *Mst. Daulat Kaur*[4] the learned Judges say

"The Court in each case will consider the entire conduct of the parties and if it comes to the conclusion that the husband has been guilty of continued neglect of the wife and has deserted her and the suit has not been instituted *bona fide*, the suit will be dismissed" (at p 897.)

It is true that in *Apturu Seenayya Reddi* v. *Apturu Mangamma*[8] the learned Judges point out that there is no duty cast upon a Hindu husband to beg his wife to return to him, but that

1. (1886) I.L.R. 10 Bom. 301.
2. (1896) I.L.R. 21 Bom. 610.
3. (1926) I.L.R. 51 Bom. 329.
4. (1934) I.L R. 16 Lah. 892.
5. (1935) 69 M.L.J. 210.
6. A.I.R. 1924 Lah. 188 (2).
7. A.I.R. 1928 Lah. 700.
8. A.I.R. 1927 Mad. 1159.

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is a case of a wife's suit for separate maintenance, where the considerations which determine the result of the suit are not necessarily the same as those in a suit for restitution of conjugal rights; and a case too which can be distinguished on the facts, for there the wife made no request to the husband to take her. Applying the principles of the Bombay and Lahore cases just quoted, and bearing in mind the facts in this case that plaintiff has had nothing to do with his wife for 20 years after his marriage, and at least 13 years after she attained puberty, and that plaintiff has definitely rejected the last offer made by defendant through D.W. 2 in 1930 to join him, I am of opinion that the learned City Civil Judge was justified in refusing the plaintiff a decree. This appeal accordingly fails, and is dismissed with costs.

K.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

T, S. Pichu Ayyangar .. *Appellant** (*2nd Plaintiff*)

v.

Sri Perarulala Ramanuja Jeer Swamigal, Dharmakartha and Manager of Sri Alagia Nambirayar Temple .. *Respondent* (*Defendant*).

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Civil Procedure Code (V of 1908), S. 105—Preliminary issue decided in plaintiffs' favour—Reversal on revision by High Court—Dismissal of suit by trial Court—Appeal—Correctness of the Order in Revision if could be considered in the appeal.

Madras Hindu Religious Endowments Act (II of 1927), S. 63 (4)—Refusal of Board to hold inquiry or frame a scheme—Court if can frame a scheme.

Worshippers filed a suit in the District Court for settling a scheme. The main objection was that Court had no power to frame a scheme. The District Judge found the issue in favour of the plaintiffs but on revision the High Court reversed the order. In consequence the District Judge dismissed the suit and plaintiffs appealed, and a preliminary objection was taken that the decision of the Judge in revision was final and cannot be questioned in appeal.

Held. as the order in Revision affected the decision of the trial court when passing decree it is clearly open to the Court on appeal by virtue of S. 105 to consider its correctness.

Held, further on the merits:

S. 63 of the Madras Hindu Religious Endowments Act does not give authority to the Court to frame a scheme in the event of the Board refusing to do so. The only orders which the section refers to are: (1) an order

*Appeal No. 229 of 1937. .. 6th March, 1940.

settling a scheme, (2) an order modifying a scheme, and (3) an order cancelling a scheme. The words "institute a suit in the Court to modify or set aside such order" are intended only to refer to an order settling a scheme or modifying or cancelling one.

Venkatasami v. *Stridevamma*, (1886) I.L.R. 10 Mad. 179, (F.B.) distinguished.

S. 65 is merely intended to give the Court power, after a scheme has been framed to modify or cancel it at any time. Nor is there any residuary power in the Court to frame a scheme. The powers under S. 92, Civil Procedure Code, have been replaced by the Madras Hindu Religious Endowments Act and that Act alone can be looked at for ascertaining the powers of a Court to frame a scheme.

Appeal against the Decree of the District Court of Tinnevelly in O. S. No. 4 of 1935.

K. V. Sesha Ayyangar and *R. Desikan* for Appellant.

K. E. Rajagopalachariar for Respondent.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—In 1933 an application was made by 20 worshippers of the Sri Alagianambirayar temple in the Tinnevelly District to the Madras Hindu Religious Endowments Board for an order directing an inquiry to be held into the question whether the Board should frame a scheme for the administration of the temple and its endowments. The Board held an inquiry and as the result of the investigation decided that it was not necessary to frame a scheme. The applicants then filed a suit in the Court of the District Judge of Tinnevelly with the object of obtaining the settlement of a scheme under a decree of the Court. The suit was defended by the trustee, who is the respondent in this appeal. It is unnecessary to set out all the objections to the suit. It is sufficient to say that the main objection was that the Court had no power to frame a scheme. On this question a preliminary issue was framed and was answered by the District Judge in favour of the plaintiffs. Thereupon the respondent applied to this Court to reverse the order in exercise of its revisional powers. The application was heard by Venkataramana Rao, J., who decided that the District Judge had erred in holding that the suit lay. In addition to allowing the petition the learned Judge dismissed the suit. On the order being communicated to him the District Judge passed a formal decree dismissing the suit with costs. The appeal is from that decree. Before proceeding to discuss the merits of the appeal it is necessary to dispose of a preliminary objection raised by the respondent, who says that

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the order of Venkataramana Rao, J., was final and therefore the appeal does not lie.

S. 115 of the Code of Civil Procedure which confers upon the Court its power of revision states that if the Subordinate Court appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity, the Court may make such order in the case as it thinks fit. The section only contemplates an order which is appropriate to the application; and the order of Venkataramana Rao, J., dismissing the suit was not appropriate. Having decided that the District Judge had erred on the preliminary issue he should have set aside his ruling and directed the District Judge to dispose of the suit in accordance with law and not to have dismissed the suit himself. The order of Venkataramana Rao, J., was an interlocutory order and the preliminary objection must be decided on this footing.

In support of his contention that the decision of Venkataramana Rao, J., is final the learned Advocate for the respondent has quoted *Ram Kirpal* v. *Rup Kuari*[1], *Mubarak Hussain* v. *Bihari*[2] and *Hook* v. *Administrator-General of Bengal*[3], but as the present case is clearly governed by S. 105 of the Code of Civil Procedure they are not in point and I do not propose to pause to examine them. That section says:

"(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-S. (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."

Authority is given here to the Court to set aside an erroneous order affecting the decision of a case, unless it be an order of remand from which an appeal lies and no appeal is filed. Sub-S. (2) appeared in the Code for the first time in 1908. Now the order of Venkataramana Rao, J., certainly affected the decision of the case, As the result of the order, the District Judge was left with no other course open to him but to dismiss the suit. Therefore the order is one which directly falls within

1. (1883) L.R. 11 I.A. 37: I.L.R. 6 All, 269 (P.C.).
(1894) I.L.R. 16 All. 306
3. (1921) 40 M.L.J. 423: L.R. 48 I.A. 187: I.L.R. 48 Cal. 499 (P.C.).

sub-S. (1) of S. 105. If the argument of the learned advocate for the respondent were to be accepted it would mean that this suit would be decided by an interlocutory order and there would be no appeal either to this Court or to the Privy Council. The order of Venkataramana Rao, J., was not appealable. The Letters Patent of this Court expressly provide that an order passed in revision shall not be subject to an appeal and S. 3 of the Code of Civil Procedure says that no appeal shall lie to His Majesty in Council from the decree or order of one Judge of a High Court. Therefore the order of Venkataramana Rao, J., does not fall within the purview of S. 109 of the Code which provides for appeal to His Majesty in Council from a final order or a decree of a High Court. The present appeal is from the decree, and as the order affected the decision of the Court when passing decree it is clearly open to this Court by virtue of S. 105 to consider its correctness.

I will now turn to the merits of the appeal. S. 62 of the Madras Hindu Religious Endowments Act, 1926, says that when the Board has reason to believe that the trustee of a math or excepted temple has been mismanaging the endowments or has been spending or alienating them for improper purposes, or when not less than twenty persons having interest make an application to the Board stating that in the interests of the proper administration of the endowments a scheme of administration should be settled, the Board may hold an inquiry. The Board cannot be compelled to hold an inquiry. If it decides that an inquiry is not necessary, the applicants can carry the matter no further. So much is conceded by the learned Advocate for the appellant. The decision of the appeal depends upon the interpretation to be placed on sub-S. (4) of S. 63, but the sub-section must be read in conjunction with the first part of sub-S. (1) and sub-S. (3). The first part of sub-S. (1) of S. 63 reads as follows:

"If after making the inquiry referred to in S. 62 the Board is satisfied that the trustee concerned has mismanaged the endowments of such math or temple or has spent or alienated them for improper purposes, or that, in the interests of the proper administration of such endowments, a scheme of administration should be settled, the Board may, after consulting in the prescribed manner the trustee and the persons having interest, by order settle a scheme of administration for the endowments connected with such math or temple."

Sub-Ss. (3) and (4) are in these words:—

" (3) The Board may at any time by order and in the manner provided in sub-S. (1) modify or cancel a scheme settled under that sub-section.

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(4) Every order of the Board under this sub-section shall be published in the prescribed manner.

The trustee or any person having interest may within six months of the date of such publication institute a suit in the Court to modify or set aside such order."

For the appellant it is said that inasmuch as sub-S. (4) gives a person having interest in an endowment to institute a suit in the Court to modify or set aside an order under this section the power must include a power to the Court to frame a scheme, if the Court sets aside an order of the Board refusing to do so. It is also said that the Court has power to frame a scheme by reason of S. 65 to which I shall refer later. It is further said that apart from the provisions of the Madras Hindu Religious Endowments Act, 1926, there is power in the Court to frame a scheme.

I agree with Venkataramana Rao, J. that S. 63 does not give authority to the Court to frame a scheme in the event of the Board refusing to do so. The only orders which the section refers to are: (1) An order settling a scheme; (2) an order modifying a scheme, and (3) an order cancelling a scheme. I consider that the words "institute a suit in the Court to modify, or set aside such order" are intended only to refer to an order settling a scheme or modifying or cancelling one.

Mr. Sesha Ayyangar on behalf of the appellant has referred us to *Venkatasami* v. *Stridevamma*[1] and *Reasut Hossain* v. *Hadjee Abdullah*[2]. In *Venkatasami* v. *Stridevamma*[1] a Full Bench of this Court held that an order rejecting an application for the appointment of a receiver was an order passed under S. 503 of the Code of 1882, (now O 40, r. 1 and was therefore appealable under S. 588, Cl. (24) (now O. 43, r. 1, Clause (*s*)). An appeal was given from an order appointing a receiver, but nothing was said with regard to an appeal from an order refusing to appoint a receiver. The Court considered that as there was an appeal from an order appointing a receiver it followed that there must be an appeal from a negative order. This meant that on appeal the Court could appoint a receiver, if an appointment had been improperly refused by the Court below. Mr. Sesha Ayyangar says that in asmuch as the Court has the power to set aside an order of the Board to frame a scheme under S. 63 it can set aside the order refusing to settle a scheme

1. (1886) I.L R. 10 Mad. 179 (F.B.).
2. (1876) L.R. 3 I.A. 221: I.L.R. 2 Cal. 131 (P.C.).

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and if it does so this must imply a power to frame a scheme. This does not follow. The Act may vest in the Board the power to frame a scheme and in the Court only the power to modify or cancel it, and this is my reading of the Act. The Board must in the first instance frame a scheme. The Court can modify or cancel it, but it cannot take initial action. Therefore it is not a question of the Court having power to do something and refusing to do it, as in *Venkatasami* v. *Stridevamma*[1] and that makes all the difference. The decision in that case was based on *Reasut Hossain* v. *Hadjee Abdullah*[2] the second case quoted by Mr. Sesha Ayyangar.

If sub-S. (4) were to be held to apply to the Order of the Board in this case, what would be the result? The Court would have to set aside the order, but it could not pass any further order, because the power to frame a scheme is in the Board. Venkataramana Rao, J. put the position here very aptly in these words:

> "So when the Board declines to frame a scheme there is no use in the Court setting at naught that discretion because there is no power in the Court to compel the Board to frame that scheme. Unless the Court has got that power it would be futile to set aside such an order".

In my opinion the Legislature never intended sub-S. (4) to have application except to orders of the Board framing schemes or modifying or cancelling them.

This brings me to the second contention of the appellant. S. 65 says that "any scheme of administration which has been settled by a Court under S. 63", or which under S. 75 is deemed to be a scheme settled under the Act may, at any time, for sufficient cause be modified or cancelled by the Court in a suit instituted by the Board or the trustee or any person having interest but not otherwise. Mr. Sesha Ayyangar says that the words "any scheme of administration which has been settled by the Court under S. 63" must be read as meaning that the Court is given power to settle a scheme in any circumstances. I cannot read S. 65 in this way. The Court has power to settle a scheme, but it must be a scheme which has first been framed by the Board. S. 65 is merely intended to give the Court power, after a scheme has been framed, to modify or cancel it at any time.

I am also unable to accept the argument that there is a residuary power in the Court to frame a scheme. The first Act

1. (1886) I.L.R. 10 Mad. 179 (F.B.).
2. (1876) L.R. 3 I.A. 221: I.L.R. 2 Cal. 131 (P.C.).

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relating to the Madras Hindu Religious Endowments was passed in 1923. Before then a scheme for the management of a temple could only be framed in accordance with the provisions of S. 92 of the Code of Civil Procedure, and the suit required the sanction of the Advocate-General to its institution. It is common ground that since 1923, S. 92 has ceased to apply and that the Madras Hindu Religious Endowments Board has taken the place of the Advocate-General. The scheme of the first Act was to place in the Board power of supervision of Hindu temples and maths in this Province and in proper cases the control of the management, and this is the scheme of the present Act. As S. 92 of the Code of Civil Procedure has now been replaced by the Madras Hindu Religious Endowments Act, 1926, so far as Hindu Religious Endowments of this Province are concerned that Act alone can be looked at for ascertaining what the powers of the Court are. There can be no residuary powers because the former powers are taken away by the present Act. The only section which has application here is S. 63, and, as I have indicated, this section in my judgment gives no power at all to the Court to frame a scheme when the Board has refused to do so. I consider that Venkataramana Rao, J., correctly interpreted the Act in his order of revision and consequently I hold that the appeal fails and should be dismissed with costs.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I agree with my Lord, the Chief Justice on both the points dealt with in the judgment just now delivered. On the second point, which turns on the true construction of the last sentence in S. 63 (4) of the Madras Hindu Religious Endowments Act, I desire to add a few words of my own. That clause runs as follows:—

" The trustee or any person having interest, may within six months of the date of such publication institute a suit in the Court, to modify or set aside such order "

The words "such publication" and "such order" in this clause have reference obviously to the kind of order mentioned just previously, in the earlier portion of the same sub-section which directs the publication of "every order of the Board under this section" in the prescribed manner. The order with which we are here concerned is no doubt an order of the Board, but is it also one *under this section* so as to give to the appellants a right to institute a suit to modify or set it aside? I was at first impressed by the argument that the point is covered by

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the decision of the Full Bench in *Venkatasami* v. *Stridevamma*[1], but on further consideration, I think that that view cannot be sustained. The above decision was rendered no doubt on similar words but occurring in a different enactment, namely, the Code of Civil Procedure, 1882. By S. 588 (24) of that Code corresponding to O. 43, r. 1 (*s*) of the present Code, an appeal was allowed against, amongst others, orders under S. 503. S. 503 contained the various provisions relating to the appointment of a receiver, his rights and duties etc., but said nothing about the dismissal of an application made under the section, a feature which is common to both the old and the new Codes. The argument was advanced that an appeal was permitted only in respect of an affirmative order, that is to say, orders granting the application, and none against an order refusing it. The contention was negatived. the Court holding that even an order rejecting the application was an order passed *under* the section and was therefore appealable under S. 588 (24). The result was that, in the view of the Full Bench, an order *under the section*, comprehended both classes of orders positive as well as negative. Here then, it is said, we have a construction of the words *orders under* a section, and the question is, are we free to adopt a different construction in respect of what is practically the same language in the Madras Hindu Religious Endowments Act?

Two reasons in particular have operated on my mind in persuading me to assent to the opinion expressed in the judgment of the learned Chief Justice. In the first place, it is to be observed that there is nothing in common between the Code of Civil Procedure, and the Hindu Religious Endowments Act; or to say the same thing in other words, the two statutes are not in *pari materia*. Further the judgment of the Full Bench appears to have proceeded on considerations, which have little or no application to an Act like the one with which we are concerned. Parker, J., felt compelled to place a reasonable construction on the Act, and pointed out that the opposite construction could not have been intended by the Legislature. Brandt, J., laid stress on principles and expediency, and held that the view of the Full Bench was more consonant with the general principles of the Code and the rules of construction. But it cannot be said that there is anything in the general

1. (1886) I.L.R. 10 Mad. 179 (F.B.)

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principles of the Hindu Religious Endowments Act, which as pointed out by my Lord, can be said to lend support to the construction accepted in the case cited. The purpose and scope of the Madras Hindu Religious Endowments Act are quite different and leave no room for doubt that it was the intention of the Legislature to vest the supervision and control of religious institutions in a Board composed of men specially qualified by their knowledge and equipment to discharge the duty entrusted to them by the Act. It is therefore right to say that in a statute of this kind, we should require language more explicit than we have, to give a right of suit against the decisions of a body composed presumably of persons having expert knowledge in the special field of Hindu Religion and charities.

Secondly, and this in my view is a more powerful argument against the appellant, the Court should be slow to adopt a construction which is not likely to afford a real and effective remedy to the complaining party. The initial duty of framing a scheme rests with the Board and with the Board only, and all that the Court can do, assuming it has the power, is to modify or set aside its order of refusal, and not to compel it to frame a scheme. There is nothing in Ss. 63, 64 and 65, to warrant our holding that the Court by its decree can itself frame a scheme in the suit. To imply such a power in the Court from the opening words of S. 65 namely, "Any scheme of administration which has been settled by a Court under S. 63" is to place an unreasonable construction on these words, and cannot be permitted. Is the Court then to be placed in a position in which it is merely to set aside the order and still leave it open to the Board to refuse to frame a scheme, in other words to stultify itself? I think not.

I therefore feel, that whatever might be the meaning of the words in question in some other enactment or in some other context, it is not correct to construe S. 63 as conferring a right of suit against a refusal to frame a scheme under the section.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Sri Kallalagar Devasthanam, Madura, through its Executive Officer, K. N. Radhakrishna .. *Petitioner**

v.

The District Collector, Madura .. *Respondent.*

Kallalagar Devasthanam, Madura *v.* District Collector, Madura.

Madras Hindu Religious Endowments Act (II of 1927), S. 44-B—Order refusing to direct resumption of service inams—Appealability.

The District Collector is empowered by cl. (*d*) (*i*) of S. 44-B to make the order of resumption in a case where the Collector refuses to make it in the first instance. Not only are the words "confirming, modifying or cancelling" in the clause is of sufficient amplitude but it is an ordinary incident of the powers of an appellate tribunal to make the order which the tribunal of first instance failed to make.

Venkatasami v. *Stridevamma,* (1886) I.L.R. 10 Mad 179 (F.B.), applied.

Pichu Ayyangar v. *Sri Perarulala Ramanuja Jeer Swamigal,* (1940) 1 M.L.J. 882, distinguished.

Petition under Cls. 2 and 7 of the Letters Patent and 151, Civil Procedure Code, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a Writ of Certiorari calling for the records in D. Dis. No. 8921-39 dated 6th January, 1940, of the Collector of Madura and quash the said order of the Collector and to order that the costs incident to this application be paid to the petitioner by the respondent.

V. V. Chowdhary, Seshachalapathy, N. Koteeswara Rao and *A. Venkatasami* for Petitioner.

T. Krishna Row for *The Government Pleader* for Respondent.

The Court made the following

Leach, C.J.

ORDER. *The Chief Justice.*—The petitioner is the trustee of the Sri Kallalagar Devasthanam, Madura. He applied to the Revenue Divisional Officer, Melur, for orders under S. 44-B of the Madras Hindu Religious Endowments Act, 1926, directing the resumption of certain service inams granted by the temple. The Revenue Divisional Officer rejected the applications and the petitioner then filed appeals to the Collector of Madura, who held that there was no right of appeal and consequently passed an order dismissing them all. The petitioner has now asked

* C. M. P. No. 990 of 1940. 2nd April, 1940.

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this Court to quash the order of the Collector and to direct him to hear the appeals.

S. 44-B (2) (*a*) of the Madras Hindu Religious Endowments Act states that the Collector may resume the whole or any part of an inam granted for the performance of a charity or service connected with a math or temple on one or more of the following grounds: (*i*) that the holder of the inam has made an exchange, gift, sale or mortgage of it or any portion of it or has granted a lease for a term exceeding five years; or (*ii*) that the holder of the inam has failed to perform or make the necessary arrangements for performing, in accordance with the custom or usage of the math or temple, the charity or service for performing which the inam had been made; or (*iii*) that the math or temple has ceased to exist or the charity or service in question has become impossible of performance. The allegation of the petitioner was that the holders of the inams had failed to perform the services required of them. Cl. (*d*) (*i*) of sub-S. (2) says that a party aggrieved by an order of the Collector under cl. (*a*) may appeal to the District Collector, who may, after giving notice to the parties concerned and after holding such inquiry as may be prescribed, pass an order confirming, modifying or cancelling the order of the Collector. In dismissing the appeals the District Collector gave no reasons for holding that there was no right of appeal in these cases, but it must be assumed that in his opinion there could only be an appeal under the section from an order of resumption.

If the orders of the Revenue Divisional Officer dismissing the applications were orders under cl, 2 (*a*) of S. 44-B appeals do lie. In *Venkatasami* v. *Stridevamma*[1], a Full Bench of this Court held that an order rejecting an application for the appointment of a receiver was an order passed under S. 503 of the Code of Civil Procedure, 1882 and was appealable under S. 588, cl. 24 of that Code. While the Code expressly provided for an appeal against an order appointing a receiver, nothing was said about an appeal from an order refusing to appoint one. The corresponding provision of the present Code to S. 503 is O. 40, r. 1, and S. 588 (24) is now embodied in O. 43, r. 1 (*s*). The decision of the Full Bench was that a negative order was just as much within the section as an affirmative order,

1. (1886) I.L.R. 10 Mad. 179 (F.B.).

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and unless there is something in S. 44-B of the Madras Hindu Religious Endowments Act, 1926, which prevents its application the same principle must be applied here. I can see nothing in the section which prevents the application of the principle. In my opinion the words:

"May. . . . . pass an order confirming, modifying or cancelling the order of the Collector"

are not intended to be confined to an order of resumption. An unqualified right of appeal is given and if the Collector passes an order dismissing an application, the District Collector can confirm it or cancel it, and as he has the power to cancel an order refusing to resume an inam, it must follow that he has the power to grant appropriate relief.

For the respondent the recent decision in *Pichu Ayyangar* v. *Sri Perarulala Ramanuja Jeer Swamigal*[1], has been relied on. In that case my learned brother and I held that a suit did not lie to set aside an order of the Hindu Religious Endowments Board refusing to settle a scheme for the administration of the endowments of a temple under S. 63 of the Act. There is nothing in common between S. 63 and S. 44-B. Sub-S. (1) of S. 63 empowers the Board to settle a scheme after inquiring into the question whether a scheme is necessary. Sub-S. (3) gives the Board power to modify or cancel a scheme which it has settled and sub-S. (4) gives the right to an interested party to institute a suit in the Court to modify or set aside an order of the Board modifying or cancelling a scheme. Before the Board can modify or cancel there must, of course, be a scheme and the right of suit only arises when the Board has decided to modify or cancel a scheme which it has settled under sub-S. (1). The wording of S. 63 makes it quite clear that the power of settling a scheme in the first instance vests exclusively in the Board which may refuse to exercise the power. The right of suit is given in order to provide a safe-guard against improper modification or cancellation of a scheme already settled by the Board. The decision in *Pichu Ayyangar* v. *Sri Perarulala Ramanuja Jeer Swamigal*[1], did not turn on the question whether an order of the Board refusing to settle a scheme under sub-S. (1) was an order under that sub-section. That question did not really arise. The question was with regard to the interpretation of sub-Ss. 3 and 4 and it was held that they only gave a

1. (1940) 1 M.L.J. 882.

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right of suit in a case where the Board has modified or cancelled an existing scheme.

Holding as I do that the principle in *Venkatasami* v. *Stridevamma*[1] is applicable to S. 44-B it follows that I am of opinion that the Collector of Madura ought to have heard the appeals and not have dismissed them on the ground that he had no jurisdiction to entertain them. His order should be quashed and he should be directed to hear and decide the cases according to law. I consider that the petitioner is also entitled to his costs.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I concur. At first sight it might seem that we are here accepting a construction of the words "an order. . . . . . under clause (*a*)" occurring in S. 44-B (2) (*d*) (*i*), different to that which we adopted in *Pichu Ayyangar* v. *Sri Perarulala Ramanuja Jeer Swamigal*[2]. In that case the Court distinguished the decision of the Full Bench in *Venkatasami* v. *Stridevamma*[1] and held in spite of the similarity of the language, that the same, or practically the same, words in S. 63 (4) should receive a different interpretation on account of the special considerations which we held were applicable in the context. As in S. 63 so in S. 44-B (2) the character of the order which the section authorises the Collector to make is positive, that is, to make an order resuming the whole or any part of an inam of the nature specified in Cl. (1). That order he may make on his own motion or on the application of the trustee, the Committee, the Board or any other person having an interest. Before making an order of resumption the Collector has to satisfy himself that one or more of the grounds mentioned in sub-S. 2 (*a*) are proved to exist. If no such proof is forthcoming, he cannot make the order, and must dismiss the application. The power to dismiss is self evident, though not expressly mentioned. Cl. (*b*) makes it obligatory on the Collector to give notice of the enquiry to the trustee, the Committee, or the Board, and also to the inamdar concerned. It is somewhat curious that among the persons to whom notice is to go, mention is not made of an applicant whose right to apply is derived from his interest in the math or temple only. It is difficult to imagine that having taken the trouble to move the Collector, he is to drop out and take no part in the enquiry

1. (1886) I.L.R. 10 Mad. 179 (F.B.). 2. (1940) 1 M.L.J. 882.

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which he himself set on foot. Cl. (*d*) provides a right of appeal to any, that is, every party, aggrieved by the order of the Collector under cl. (*a*). It is plain, that a party may be aggrieved as much by a negative as by a positive order, and unless there is good reason to the contrary express or implied, both kinds of orders would be comprehended by the word 'under'. An applicant under S. 44-B comes forward with the case that an inam is being enjoyed by a person whose title to it has become extinguished. If an order of resumption is made, the inamdar may feel aggrieved by the order. On the contrary if the enquiry results in a negative order, the applicant, or any of the persons specified in the section, or to whom notice has gone may be dissatisfied with the order, or in other words may be an aggrieved party, and to him a right of appeal is expressly given. I find no difficulty in holding that the District Collector is empowered by cl. (*d*) (*i*) to make the order of resumption in a case where the Collector refuses to make it in the first instance. Not only are the words "confirming, modifying or cancelling" in the clause under consideration, of sufficient amplitude, but it is an ordinary incident of the powers of an appellate tribunal to make the order which the tribunal of first instance failed to make. I agree that this case is not governed by the decision in *Pichu Ayyangar* v. *Sri Perarulala Ramanuja Jeer Swamigal*[1], which really proceeded on special grounds, which find no place in the present case.

Memo of costs will follow.

K. S. *Order quashed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT:—VISCOUNT MAUGHAM, LORD PORTER, AND SIR GEORGE RANKIN.

Rama Shah .. *Appellant**

v.

Lal Chand .. *Respondent.*

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Rama Shah v. Lal Chand.

Limitation Act (IX of 1908) as amended by Act (I of 1927), S. 20—Payment by debtor on account of pronote without appropriation towards interest or principal and endorsement of it on note—Subsequent appropriation

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1. (1940) 1 M.L.J. 882.

* P. C. Appeal No. 46 of 1938. 22nd February, 1940.

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by creditor within period of limitation towards principal—Sufficiency to start fresh period of limitation.

The rule that a creditor has the right to have a payment made by his debtor treated in account as liquidating the interest before the principal does not operate to constitute a payment, payment of interest as such within the meaning of the section. In the absence of an intention in the debtor to make the payment for that purpose, and even when the requirement of the section about writing is satisfied, it is still insufficient to give rise to a fresh period of limitation when the debtor has made the payment generally in account and the creditor has appropriated it to interest. The section, however, contains no stipulation as to the debtor's intentions in relation to a part payment on account of principal, and accordingly the intention of the debtor is not made the sole test to determine whether a given payment was in fact made towards the principal; nor is it necessary that the character of the payment should be ascertained or ascertainable at the time when it is made, or that it should appear by the writing which the section prescribes. A debtor's payment on general account is not however *ipso facto* either a payment of interest or a part payment of principal. While the writing evidencing the payment which the section requires need not come into existence at the time when the payment is made, it is otherwise with the creditor's act of appropriation of the payment to the principal of the debt, for a creditor cannot have power after the period of limitation has expired, to remove the bar by making an appropriation to principal. While the creditor's appropriation need not be communicated to the debtor within the time limited, it is necessary in order to satisfy the section that the creditor should, within the prescribed period, in exercise of his right have done something which treats the payment as made on account of principal; and to evidence a definite appropriation to the principal made within the prescribed period, the manner in which the payment has been dealt with by the creditor in his own books of account will ordinarily be sufficient.

Accordingly, where the defendant gave the plaintiff a promissory note payable on demand dated 4th February, 1930 for which the prescribed period of limitation under the Act was three years from its date, and on 24th January, 1933, the defendant paid the plaintiff Rs. 100 at the same time endorsing the note with the words "Paid Rs. 100 today in this pronote" with his signature and the date.

Held, in an action in the note brought in 1936, that the plaintiff was entitled to recover as there was evidence that the payment had been appropriated to principal by the defendant within the prescribed period.

Udaypal Singh v. *Lakhmi Chand,* (1935) I.L.R. 58 All. 261 (F. B.) and *Municipal Committee, Amritsar* v. *Ralia Ram,* (1936) I.L.R. 17 Lah. 737 at 756, approved.

N. A. M. Appasami Pillai v. *Morangam Muthirian,* (1934) 68 M.L.J. 73; *Liquidator, Bagha Co-operative Society* v. *Debi Mangal Prasad Sinha,* (1936) I.L.R. 16 Pat. 27; *Bankanidhi Tantra* v. *Godipatna Co-operative Society,* (1936) I.L.R. 16 Pat. 294; *Khan Sahib* v. *Uchil Lebbay,* I.L.R. 1938 Rang. 591, criticised.

Appeal from a decision of the High Court, Lahore, dated 14th April, 1937 (Dalip Singh and Skemp, JJ.) reversing a decision dated 9th June, 1936, of the Subordinate Judge of Jhelum.

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The facts appear sufficiently from the judgment:—

L. P. E. Pugh, K. C. and Chinna Durai for Appellant.—[The arguments are reported only on the question of law.] The condition as to writing imposed by S. 20 (1) being fulfilled a fresh period of three years must necessarily have begun from the date of the payment on 24th January, 1933. Admittedly the payment was a general one, and the endorsement contains no indication whether it was made on account of principal or of interest. But, it is submitted, the payment must necessarily be one or the other, and in either case the sub-section is complied with and a fresh period is accordingly set on foot. It is therefore immaterial whether the payment was in fact intended to be made, and made, on account of interest or on account of principal.

Supposing, however, that an appropriation must be made by the creditor in order to fix the purpose for which the payment is made, then it is submitted, the appropriation can be made at any time provided that the payment itself took place within three years of the date of the promissory note. The authorities establish that the written acknowledgment of the payment prescribed by S. 20 (1) need not be made out within the prescribed period if the payment itself is made in time. That rule must surely be applicable also to the act of appropriation by the creditor, and the fact that there is no reported decision to that effect is no indication to the contrary.

In any event it is submitted on the facts that the appropriation was made within the period and that the action is therefore in time.

J. P, Eddy, K. C. and R. Ritson for Respondent.—The essential fact is that the payment of Rs. 100 on which the appellant relies as initiating a new period of limitation was made by the respondent without any appropriation on his part, as the indorsement on the promissory note shows. In fact it was not a payment of interest *as such*, nor was it a part payment of the principal. It was in any case necessary for the purposes of S. 20 (1) that the character of the payment should be determined by appropriation at the time when it was made, and it would appear reasonable to require that the determination should be manifested by the written acknowledgment required by the sub-section. None of those conditions has been fulfilled here.

The argument that no appropriation is necessary on the ground that a payment must necessarily be on account of principal or of interest was rejected by the majority decision in *Udaypal Singh* v. *Lakhmi Chand*,[1] and there are in fact other possible ex-

1. (1935) I.L.R. 58 All. 261 (F.B.)

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planations of such a payment. The appellant's difficulties do not, however, it is submitted, end there. The High Court has found on the evidence that he did not appropriate the payment of Rs. 100 to principal within three years of the date of the promissory note, that finding is conclusive in the respondent's favour because, even if it be not necessary that the character of the payment should be determined or determinable at the date when it is made, the determination in the form of an appropriation by the creditor must be made within the three year period. Were that not the case, a creditor would have it in his power, at a time when his debt was already time-barred, hastily to remove the bar by making an appropriation, and he might on that argument take such a step without even obtaining the debtor's consent. It is submitted that that cannot be right. No appropriation was made by the appellant within the prescribed time, and accordingly the debt is barred and the action should be held to fail.

22nd February, 1940. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—This appeal raises questions as to the true construction and effect of S. 20 of the Indian Limitation Act (IX of 1908) as amended by the Indian Limitation Amendment Act (I of 1927). Conflicting decisions in India have made it desirable that their Lordships should construe the section, and as in the present case the High Court has differed from the trial Court on the facts, the evidence must be examined.

The plaintiff appellant, Rama Shah, is described as a banker and carries on a business at Jhelum which includes the lending of money. The defendant, Lal Chand, is a timber merchant of the same town who on various occasions between the 17th October, 1929, and the 17th July, 1931, took a loan from the plaintiff, giving to him a promissory note for the amount of the loan, with interest at twelve per cent. per annum. Two small loans not covered by promissory notes were alleged by the plaintiff to have been made, and were disputed by the defendant, but five promissory notes are admitted by the defendant, and a number of substantial payments are admitted by the plaintiff to have been received in respect of them. There has, however, been considerable dispute between the parties as to the proper allocation of the payments to promissory notes. In the result, when the plaintiff on the 24th January, 1936, brought, in the Court of the Subordinate Judge at Jhelum, the suit out of which this appeal arises he brought it as a suit for the balance

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due upon a promissory note for Rs. 18,500 dated 4th February, 1930. He claimed that the amount outstanding for principal and interest was Rs. 11,463. The learned Subordinate Judge was satisfied as to the correctness of this figure, but, the High Court having reduced it to Rs. 10,334-9-3, the plaintiff by his counsel has accepted the lower figure as the sum to be decreed if it be held that his suit succeeds.

The promissory note of the 4th February, 1930, being expressed to be payable on demand the period of limitation for a suit on the note was three years from its date (Article 73) so that the plaintiff's suit of the 24th January, 1936, was *prima facie* barred. There was an endorsement, however, on the note in the writing of the defendant dated the 24th January, 1933, signed by him: "Paid Rs. 100 *to-day in this pro note (sgd.) Lal Chand, Bahri*, 24th January, 1933". This date was within the period of three years from the date of the note, but only by a few days, and the probable object of the endorsement is reasonably plain. The defendant admitted that he had made the endorsement on the 24th January, 1933, but denied that any money passed. Both Courts in India have disbelieved him on this point, and it is not now disputed that the sum of Rs. 100 was paid as the endorsement states.

The proviso at the end of the first sub-section of section 20 of the Limitation Act, 1908, was the subject of amendment made by Act I of 1927, and the amended sub-section stands as follows:

"20.—(1) Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made:

Provided that, save in the case of a payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment."

Before 1927 the proviso read:—

"Provided that in the case of part payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same."

There is no room for the contention that the sum of Rs. 100 exceeded the amount of principal or of interest outstanding in respect of the note at the date of the payment so

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that part of it at least must of necessity have been intended to go towards interest or towards principal.

Applying the amended sub-section to the present case, the learned Subordinate Judge found on the evidence that the payment of Rs. 100 on the 24th January, 1933, was immediately appropriated by the plaintiff towards the principal of the debt, and was a part payment of principal from which a fresh period of limitation began to run. He accordingly gave judgment for the plaintiff (9th June, 1936). On appeal, the High Court at Lahore (Dalip Singh and Skemp, JJ.) held that the sum of Rs. 100 was never appropriated by the debtor or by the creditor either to interest or to part payment of principal until the date of suit (24th January, 1936), or at earliest until the 18th December, 1935—that is, until long after three years had elapsed from the date of the note. On this view of the facts the High Court, by the decree (14th April, 1937) now under appeal, dismissed the suit as time-barred, being of opinion that a payment made generally on account of an interest-bearing debt becomes a payment towards the principal only by appropriation thereto and must (in order to have the effect of preventing limitation) be appropriated before the period of limitation has expired. In so holding the learned judges followed a decision of the High Court at Allahabad in *Udaypal Singh* v. *Lakhmi Chand*[1], a Full Bench case in which two of the five members of the Full Bench had dissented. It appears that some dissent has since been expressed in the High Court at Patna (*Liquidatar Bagha Co-operative Society* v. *Debi Mangal Prasad Sinha*[2], and *Bankanidhi Tantra* v. *Godipatna Co-operative Society*[3]. *Khan Sahib* v. *Uchil Lebbay*,[4] is also inconsistent with the Full Bench decision.

A recent case, *Kesar Singh* v. *Wasir Singh*[5], before the Lahore High Court in revision under S. 25 of the Provincial Small Causes Courts Act (IX of 1887) was referred by Tek Chand J. to a Division Bench by an order dated the 9th June, 1939, which has been laid before the Board. In this order the different views taken by High Courts in India as to the correctness of *Udaypal's case*[1], have been usefully set out, and it would appear that in some respects that decision is not consis-

1. (1935) I.L.R. 58 All. 261 (F.B.).
2. (1936) I.L.R. 16 Pat. 27.
3. (1936) I L.R. 16 Pat. 294.
4. I.L.R. 1938 Rang. 591.
4. (Civil Revision No. 559 of 1938).

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tent with certain previous decisions, and that the decision of the Lahore High Court now under appeal has not since been uniformly followed in that Court.

It will be convenient that their Lordships should state their opinion as to the effect of section 20 in a case where the debtor has made a payment on account of an interest-bearing debt without appropriating the sum paid either towards interest or principal, and where the creditor has made no appropriation until after the expiry of the period of limitation. The view taken by the dissenting judges in *Udaypal's case*[1], is that, as the debtor, in making the payment, must have meant it to go either towards interest or principal, a fresh period of limitation must always begin to run if the requirement as to writing is satisfied. This view has, in one or other of the cases upon the subject, been defended both by regarding the words "as such" retained in the amending section, as nugatory, and by contending that if the payment was not intended by the debtor as a payment of interest he must have intended it as a payment on account of principal, and that in any case it was a part-payment of principal, even if not of principal as such. On the other hand the view taken by Sulaiman, C.J., in *Udaypal's case*[1] was that where no appropriation is made by the debtor the creditor may appropriate: if he appropriates the payment towards interest it becomes a payment of interest though not paid by the debtor as such; if he appropriates it towards principal it becomes a part-payment of principal and saves limitation none the less that it was not paid as such. The learned Chief Justice rejected the doctrine that the debtor's payment must be either a payment of interest as such or a part payment of principal.

So far, their Lordships are of opinion that the learned Chief Justice was in the right. When the amendment of 1927 extended the requirement of writing to the case in which interest had been paid, this amendment was carried out by altering the language of the proviso at the end of the sub-section leaving the language of its main provision to stand as before. The words "as such" had long been given a settled meaning importing the intention of the debtor that his payment should go towards interest as distinct from principal. Though the amendment raised in a pointed manner the question whether

1. (1935) I.L.R. 58 All. 261 (F.B.)

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the words "as such" should be retained, it is clear that the legislature decided to retain them; and it is not reasonable, as a matter of construction of a statute, to suggest that they can be ignored; or that their meaning has changed; or that they can be given their meaning but only as regards payments made before the 1st January, 1928. Though interest and principal are under the section on a different footing as regards the person making the payment, it is not very clear why the legislature should have hesitated to drop the words "as such", and it may well be that the difficulty could best be resolved by their omission. But the section must be construed carefully according to its terms, and effect must be given to the consideration that, in order to give a fresh period of limitation, interest must be paid as such though there is no similar requirement in the case of a part-payment of principal.

In *Firm Rai Bahadur Het Ram Bodh Raj* v. *Firm Seth Aya Ram Tola Ram*[1], the Board had to consider a case in which a judgment debt was by certain terms of compromise payable by instalments. The first instalment was to have been paid on 27th January, 1929, and was to be Rs. 13,000 with a year's interest to that date—that is from 27th January, 1928, to 26th January, 1929. It was stated by Lord Russell of Killowen delivering the judgment of the Board:

"The last payment made in respect of the first instalment and interest was a sum of Rs. 825 paid, as admitted by the parties on the 15th February, 1929. The payment was made, and necessarily made, in respect of principal and interest; it was therefore a payment of interest on a debt as such by the person liable to pay the debt Further, in a letter addressed to the decree-holders, and signed by Bodh Raj, he says, referring to the Rs 825, 'Deduct from this the amount that is due to you for my first instalment according to accounts and keep the rest in my name . . . . Send me a formal receipt of the amount of the first instalment together with interest by registered post.' These facts are sufficient to show that S. 20 has come into play, and that accordingly the period of limitation must be computed from the 15th February, 1929."

This was a decision under the amended section and it shows that the words "as such" have lost nothing of their previous meaning, which involves that the intention of the debtor must be shown to have been that the payment should go towards interest. The case also shows, however, that the intention of the debtor may be proved not only by statements made by him at the time of payment but in any other

2. (1937) 42 C.W.N. 509.

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manner, and may clearly appear from the circumstances of the case. This doctrine had been settled law in India under the unamended section—see *Gopinath Singh* v. *Hardeo Singh*[1], *Charu Chandra Bhattacharjee* v. *Karam Bux Sikdar*[2]. Even when the requirement as to writing is satisfied it is still insufficient to give rise to a fresh period of limitation that the debtor has made the payment generally on account and that the creditor has appropriated it to interest. Nor in the absence of an intention on the part of the debtor does a payment amount to a payment of interest as such by reason of the rule that it is the right of a creditor to have payments treated in account as liquidating the interest before the principal—the "old rule" recognised by the Board in *Venkatadri Appa Row* v. *Parthasarathi Appa Row*[3], citing Rigby, L.J., in *Parr's Banking Co.*, v. *Yates*[4]. The rule was stated with precision by Lord Macmillan (*Income-tax Commissioner* v. *Maharajadhiraja of Dharbhanga*)[5], in the following terms:

"Where interest is outstanding on a principal sum due and the creditor receives an open payment from the debtor without any appropriation of the payment as between capital and interest by either debtor or creditor, the presumption is that the payment is attributable in the first instance towards the outstanding interest."

On the other hand, it remains true that the section, when dealing with part payment of principal, contains no similar stipulation as to the debtor's intention. The words "as such" are not repeated, and the contrast between the two classes of payments is too marked to be mistaken or over-looked. Of course a payment may be shown to have been intended by the debtor to go—in part at least—towards the reduction of the principal debt by direct proof or for instance, by the fact that the amount of the payment exceeded the interest then due. But the intention of the debtor is not made the sole test whether a payment was made towards the principal of the debt. *In re Ambrose Summers*[6] was a case where the debtor had sent to his bank a cheque for Rs. 600 to be placed to the credit of his loan account, and the bank had thereafter charged interest on the principal sum less Rs. 600. Sale, J. held that this operated in fact as a part payment of the principal debt. In numerous cases

1. (1909) I.L.R. 31 All. 285. 2. (1917) 27 C.L.J. 141.
3. (1921) 40 M.L.J. 549: L R. 48 I.A. 150: I L.R. 44 Mad. 570.
4. (1898) L.R. 2 Q B. 460 at 466.
5 (1933) 64 M.L.J. 612: L.R. 60 I.A. 146 at 157: I.L.R. 12 Pat. 318 (P.C).
6. (1896) I.L.R. 23 Cal 592, 598.

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it has been held that a payment made without appropriation by the debtor will, if it be appropriated by the creditor towards the principal debt, be sufficient to give rise to a fresh period of limitation.

Their Lordships cannot accept the contention of learned counsel for the respondent that appropriation by the creditor can have no effect under the section as it now stands, or that the character of the payment must necessarily be determined at the time when the payment is made. Stress was laid on the change in the proviso from "the fact of the payment appears" to "an acknowledgement of the payment appears", but neither expression affords in their Lordships' opinion any ground for holding that the character of the payment, as intended to go towards interest or towards principal, must appear by the writing, still less that it must be ascertainable or ascertained at the date of the payment.

In *Udaypal's case*[1] Sulaiman, C.J., lent the weight of his authority to the view that the section must be read as proceeding upon an acknowledgement by the debtor of his liability, though the learned Chief Justice agreed that the section is not professedly based upon any such principle. Accordingly, he put the case of a payment insufficient to discharge the debt in full but made upon the footing that no more was due, and he expressed the opinion that such a payment would not be within the section. Their Lordships cannot agree that the section is to be read as governed by any such principle as is suggested, familiar though it be in the law of England. They can discover no sufficient reason for the assumption that the section is an expression of any single principle. In English law effect was first given to acknowledgements and payments by reason of general principles of exception applied by the Courts to the Statute of Limitation (1623) which did not contain express exceptions in these respects, and though the exceptions were in the end made statutory they retained much of their original character. In the Indian Limitation Act, S. 19, which deals with acknowledgements, is not to be read as based upon the theory of implied promise; and it is difficult to see why S. 20, which deals with payments, should be regarded as based upon a theory of acknowledgement. The Indian legislature may well have thought that a payment if made on account of the debt and evidenced by writing gave the

1. (1935) I.L.R. 58 All. 261 (F.B.).

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creditor some excuse for further delay in suing, or was sufficient new proof of the original debt to make it safe to entertain an action upon it at a later date than would otherwise have been desirable. The words in S. 20 by which the matter must be judged are "where part of the principal of a debt is paid". As it is not prescribed by the section that the payment should be intended by the debtor to go towards the principal debt at all, the words "as such" having no place in this part of the section, it is not in their Lordships' view correct to require that the payment should have been made of part as part. On this point the view taken in *Municipal Committee, Amritsar* v. *Ralia Ram*[1] is to be preferred to the view taken in *N.A.M. Appasami Pillai* v. *Morangam Muthirian*[2] which applied the English decisions.

The main contention of the learned judges who were in the minority in *Udaypal's case*[3] and of others who dissent from that decision, is that if a payment be made by a debtor without allocating it to principal or to interest it can correctly be regarded as a part-payment of principal by reason of the mere fact that it was not made on account of interest as such. In cases decided before 1927 there is some trace of the opinion that where the requirement of writing was satisfied it mattered nothing whether the payment was for interest as such, since if not it was a part-payment of principal. This appears to have been the view of Fletcher, J., in *Hem Chandra Biswas* v. *Purna Chandra Mukherji*[4]. Their Lordships agree with the majority of the Full Bench in *Udaypal's case*[3] in rejecting the attempt to maintain that a payment on general account is either a payment of interest as such or a part-payment of principal. The disjunction is incomplete: as Sulaiman, C.J., put it "there are additional possibilities as well" (p. 273). There are indeed four possibilities as to the debtor's intention—(1) intention that the sum paid should go against interest, (2) that it should go against principal, (3) that it should go against both interest and principal, (4) no intention of appropriation as between interest and principal. This is a common enough frame of mind when a payment is made generally on account of a debt—an "open

1. (1936) I.L.R. 17 Lah. 737 at 756.
2. (1934) 68 M.L.J. 73: A.I.R. 1935 Mad. 371.
3. (1935) I.L.R. 58 All. 261 (F.B.).
4. (1916) I.L.R. 44 Cal. 567,

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payment" as it was called by Lord Macmillan in a passage already cited in this judgment.

The facts of *Udaypal's case*[1] were that the payment was made by the debtor without any appropriation as between principal and interest; it was appropriated by the creditor to interest; and the suit was brought to recover the whole of the principal debt with certain further interest. In these circumstances it appears to their Lordships that it was rightly held by the Full Bench that the payment was neither a payment of interest as such nor a part-payment of the principal debt. It is no answer to say that the part-payment of principal need not be made as such: on these facts there was no payment of principal at all.

The subject of "appropriation of payments" is dealt with in the Indian Contract Act by Ss. 59 to 61, inclusive. S. 60 provides that, when the debtor has omitted to intimate, and there are no other circumstances indicating, to which debt the payment is to be applied the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor. This is the same rule as that laid down as English law by the House of Lords in *Cory Brothers & Co.* v. *Owners of Turkish Steamship "Mecca"*[2] and under it the creditor has a right to appropriate a payment by the debtor to the principal or to the interest of the same debt. There is no obligation upon the creditor to make the appropriation at once (*Income-tax Commissioner* v. *Maharajadhiraja of Dharbhanga*[3] and *Kunjamohan Shaha Poddar* v. *Karunakanta Sen Chaudhuri*[4]) though when once he has made an appropriation and communicated it to the debtor he would have no right to appropriate it otherwise (*cf.* per Lord Herschell in *Cory's case*[2]). Lord Macnaghten's language in that case is equally applicable under Ss. 60 and 61 of the Indian Contract Act—"Where the election is with the creditor it is always his intention expressed or implied or presumed, and not any rigid rule of law that governs the application of the money" (p. 294).

What, then, in the case of an "open" payment is required in order that it may be said in the words of S. 20 that before

1. (1935) I.L.R. 58 All. 261 (F.B.).
2. (1897) A.C. 286 at 292.
3. (1933) 64 M.L.J. 612: L.R. 60 I.A. 146 at 162: I.L.R. 12 Pat. 318 (P.C.).
4. (1933) I.L.R. 60 Cal. 1265 at 1270-1.

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the expiration of the prescribed period part of the principal of the debt has been paid by the debtor? Learned counsel for the appellant pointed to the decisions whereby it has been held that the writing in which appears an acknowledgment of the payment (before 1928, the fact of the payment) need not have come into existence within the prescribed period though the payment itself has to be made within the period and the fresh period of limitation begins to run from the date of the payment. He contended that a similar principle should be applied to the creditor's act of appropriation and that so long as the payment was made within time the appropriation towards the principal debt might be made at any subsequent time and would give rise to a fresh period computed from the date of payment. Learned counsel conceded that in no case had this yet been held and it was forcefully maintained for the respondent that it is impossible, after the prescribed period has run out, to regard anything done by the creditor without even the debtor's consent as effective to extend the time. Their Lordships, while not throwing doubt on the principle that the writing evidencing the payment may come into existence at any time, are of opinion that the creditor's act of appropriation of the payment to the principal debt is a very different matter. It cannot, they think, have been intended by the legislature that at the end of the prescribed period the right to sue should be barred and yet that the creditor might thereafter remove the bar at his own choice by making an appropriation. While not of opinion that it need be shown that the creditor's appropriation has within the time limited been communicated to the debtor, they are unable to regard the language of the section as satisfied unless within the prescribed period the creditor has in exercise of his right done something which treats the payment as made on account of principal. To evidence a definite appropriation to the principal debt made by the creditor within the period prescribed the manner in which the payment has been dealt with by the creditor in his own books of account will ordinarily be sufficient. But if it be true that until after the expiry of the prescribed period the creditor has treated the sum as paid on account of interest or has not done anything to treat it as paid on account of principal, then under the amended S. 20 part-payment of principal has not been established. The result may be regarded as unfortunate since the fresh period begins or does not begin according as the creditor has or has not taken some step in consequence of the

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debtor's act, whereas the essential matter is really the debtor's act, but unless either a part-payment of principal is required to be made as such in order to stop the running of the statute or a payment on account of an interest-bearing debt, though made generally on account, is made sufficient for that purpose there is no escape from this conclusion.

It remains to consider what happened in the present case when the defendant on the 24th January, 1933, paid Rs. 100 to the plaintiff in respect of the promissory note of the 4th February, 1930. The main contest at the trial was upon the question whether any money was paid. The defendant's denial in the witness-box has been held by both Courts in India to be untrue. He did not produce his ledger at all. The plaintiff at the first hearing (O. 13, r. 1, Civil Procedure Code) produced an account sent by him to the defendant on the 18th December, 1935, shortly before suit. He also produced his books of account from 1929 to 1936 containing the account of the defendant in the ledger as well as a rough cash book and cash book (*kachi* and *pukki rokar*). That the defendant had full opportunity to inspect and examine these appears from the cross-examination on behalf of the defendant. That the trial Judge closely examined them appears from his judgment. In one passage he says "The plaintiff's kachi rokar is silent as to this payment but pukki rokar and ledger have got the entry" and at the end he says "I am not satisfied with plaintiff's method of keeping his kachi rokar in which admittedly there are blank spaces here and there. . . . But in as much as the plaintiff's case is proved otherwise as also by production of pukki rokar and the ledger where (whose) entries are further strengthened by defendant's withholding of his books I would allow plaintiff a decree. But as a matter of punishment to plaintiff for keeping a perfunctory kachi rokar I would allow him only half costs." At the trial each party followed the practice (still common in certain parts of India notwithstanding repeated condemnation by the Courts and by this Board) of calling as his own witness the clerk of his opponent. The defendant's clerk was called by the plaintiff to prove receipt of a certain sum of Rs. 200, but in cross-examination on behalf of his master he produced his cash book which contained no entry of the payment of Rs. 100 on the 24th January, 1933, and stated (falsely as it must now be taken) that the promissory note was

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endorsed in his presence without any payment having been made. The plaintiff's *munib* Godar Mall, called by the defendant said that the account dated the 18th December, 1935, was copied by him correctly from the plaintiff's ledger; that "our *kachi* and *pukki rokars* are regular." The plaintiff also deposed that "our *bahis* are regularly kept" and spoke to the payment of Rs. 100 and to a number of other matters of account. He explained that in his books there was only one ledger account of the defendant. The account dated the 18th December, 1935 (Exh. D1 is the Hindi original) is made out on what is called the *katauti* principle—that is to say, interest is calculated on both sides of the account at the same rate so that to any sum paid by the defendant is added interest thereon before deduction is made from the total sum shown to be due for principal and interest upon each loan. In the plaint it was incidentally alleged that "deduction of interest at *katauti* rate" entered into the account in respect of this promissory note. At the trial specific questions addressed to the appropriation of the sum of Rs. 100 do not appear to have been asked of any witness, the contest being upon the fact of payment; but when the evidence was closed much argument was expended upon the question whether the writing was an acknowledgement of part-payment of principal. The learned Subordinate Judge rightly directed himself that the plaintiff had to prove that he appropriated the sum towards the principal debt before the expiry of the period of limitation for a suit on the promissory note. He held that the account of the 18th December, 1935, sent to the defendant showed that the plaintiff had given credit for the sum as against the principal sum and that had the defendant not intended this to happen he would have protested at once. "In the present case the defendant pays Rs. 100 in his own handwriting and the plaintiff appropriates it towards principal straightaway. This payment in my opinion must be held to be part-payment of principal." The learned Judges of the High Court have reversed this finding of fact mainly on the ground that they were not prepared to hold that the account dated the 18th December, 1935, and the evidence of the plaintiff's *munib* proved that in the plaintiff's ledger the sum of Rs. 100 had been treated as a part-payment of principal. They appear to agree that the account was drawn up from items entered in the ledger but not that it was a copy of the defendant's account, holding

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that it was merely prepared for the purposes of the suit. They considered that this view was fortified by the last entry in the account which was out of its proper order according to date. The plaintiff's books, notwithstanding that he produced them, deposed to their regularity, and was cross-examined on their details, were in the High Court treated as though they could only be guessed at on the basis of the account of the 18th December, 1935, and the plaint of January, 1934. The High Court might have been saved from taking this course had the trial Judge been careful to mark the plaintiff's books and all the entries referred to at the trial either as exhibits or for identification. But with all respect to the learned Judges, their Lordships think that the course adopted in the High Court was unduly hard upon the plaintiff, more particularly as the trial Judge had gone very fully into the plaintiff's books and the question was not merely a question as to one item but as to the character of the account of the defendant in the books of the plaintiff—whether it was kept on the *katauli* method. Upon this, the refusal of the defendant to produce any relevant book of account kept by himself, save and except an untrue cash book, and the High Court's finding that the Rs. 100 were paid, made the burden on the plaintiff light and their Lordships are unable to hold that there was sufficient reason for reversing the finding of the Subordinate Judge.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and the decree of the High Court at Lahore dated the 14th April, 1937, set aside; that the decree of the Subordinate Judge at Jhelum dated the 9th June, 1936, be restored with the variation that instead of the sum of Rs. 11,463-8-0 therein mentioned the sum of Rs. 10,334-9-3 be substituted. The respondent must likewise pay the plaintiff's costs in the High Court and of this appeal.

Solicitors for Appellant: *Hy. S. L. Polak & Co.*

Solicitors for Respondent: *Nehra & Co.*

R.C.C. *Appeal allowed.*

K.S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

S. Gopalachariar .. *Appellant** (*Appellant-Petitioner*)

v.

Nallayya Chetty and others .. *Respondents* (*Respondents-Respondents*).

Gopalachariar *v.* Nallayya Chetty.

Hindu Law—Coparcener disqualified from claiming a share in joint family property—Notice by—If can sever his legal connection with family.

A notice by a person who is disqualified from claiming a share in joint family property is inoperative to sever his legal connection with that family.

Venkateswara Pattar v. *Mankayammal*, (1934) 69 M L J. 410, distinguished.

Appeals against the orders of the Court of the Subordinate Judge of Chingleput dated 5th February, 1935 and made in A. S. Nos. 69 and 101 of 1934—preferred against the orders of the Court of the District Munsif of Tiruvellore in E. P. Nos. 563 and 1175 of 1932 in Suit Nos. 7898 and 16242 of 1931 respectively on the file of the Court of Small Causes, Madras.

B. Jagannadha Das for Appellant.

T. K. Srinivasa Thathachariar for Respondents.

The Court delivered the following

JUDGMENT,—The notice which is the subject-matter of these two appeals has already come before a Bench of this Court of which I was a member in C.C.C.A. No. 10 of 1934 and it was there held that it was inoperative to effect any division of status. Appellant's learned advocate has been unable to show me any judicial pronouncement to the effect that a person disqualified from claiming a share in joint family property may nevertheless sever his legal connection with that family by issuing a notice; and he has not seriously challenged the conclusions of the lower appellate Court based upon *Girja Bai* v. *Sadashiv Dhundiraj*[1]. The case in *Venkateswara Pattar* v. *Mankayammal*[2] was one where a father of an insane son separated himself from him by a formal notice and is therefore dealing with facts essentially different. I must follow the earlier Bench decision

*A.A.A.O. Nos. 184 and 185 of 1935. 23rd February, 1940.

1. (1916) 31 M.L.J. 455: L.R. 43 I.A. 151: I.L.R. 43 Cal. 1031 (P.C.).
2. (1934) 69 M.L.J. 410.

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with reference to this notice and dismiss these appeals with costs.

Leave refused.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Soundararajappa Mudaliar .. *Appellant** (*1st Defendant*)

v.

Minor Krishna Aiyar, by guardian Raghavendra Rao and another .. *Respondents* (*Plaintiff and 2nd Defendant*).

Soundararajappa Mudaliar v. Krishna Aiyar.

Madras Hereditary Village Offices Act (*III of 1895*), *Ss. 13* (*1*) *and 21—Suit for declaration as to appointment of karnam—Absence of jurisdiction of Civil Courts.*

Plaintiff sued for declaration that the defendant's appointment as karnam was illegal and for registry of his own name as holder of the office which was hereditary.

Held, that the Civil Courts had no jurisdiction in the case. The fact that the defendant was a stranger to the family did not make any difference.

Ramakrishnayya v. *Venkataranga Rao,* (1932) 63 M.L.J. 577, distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in A. S. No. 134 of 1936 (A. S. No. 4 of 1936, District Court, Coimbatore) presented against the decree of the Court of the District Munsif of Udumalpet in O. S. No. 49 of 1934.

G. Natarajan for Appellant.

The Government Pleader (*B. Sitarama Rao*) and *V. C. Viraraghavan* for Respondents.

The Court delivered the following

JUDGMENT.—The decisions of the lower Courts are clearly wrong. The suit in this case was one in which the plaintiff claimed two reliefs (1) a declaration that the first defendant's appointment as karnam of Kondampatti was illegal and (2) registry of his own name as holder of the office of karnam. The office of karnam in Kondampatti is hereditary and the plaintiff's case was based on the allegation that he was the nearest heir to one Krishnamurthi the last registered office-holder. This suit

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* S. A. No. 40 of 1937. 6th March, 1940.

Soundararajappa Mudaliar *v.* Krishna Aiyar.

was exactly a suit of the kind described in S. 13 (1) of the Madras Hereditary Village Offices Act (III of 1895). Consequently the jurisdiction of the Civil Courts was barred by S. 21 of the Act (III of 1895).

It makes no difference that the first defendant is a stranger to the family of the plaintiff. The lower courts have been led astray by the decision in *Ramakrishnayya* v. *Venkataranga Rao*[1]. That was a case in which a certain hereditary office had been abolished under S. 6 (1) of the Act. The section itself provides that where villages are grouped etc., the hereditary offices in them shall *cease to exist* and new hereditary offices shall be created. Hence, in such a case, as Ananthakrishna Ayyar, J. pointed out, no suit could possibly be filed under S. 13 for any of the new offices. That is the distinction between that case and this. Here a suit can be filed under S. 13 of the Act and such a suit *was* filed in the Revenue Court and pursued up to the Board of Revenue.

I am quite clear that the Civil Courts had no jurisdiction in this case. The decrees of the lower Courts are set aside and the plaintiff's suit is dismissed. The plaintiff (first respondent) must pay the costs of the appellant (first defendant) throughout.

Leave refused.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Meherwan Jehangir and others .. *Appellants** (*Plaintiffs 2 to 7*)

v.

Dhunbhai Kavasha Mistri and others .. *Respondents* (*Defendants 2 to 10*).

Meherwan Jehangir *v.* Dhunbhai Kavasha Mistri.

Will—Bequest—Residuary bequest—Transfer of all properties not covered by will—Effect—Bequest to certain persons as members of tarwad*—Whether void for uncertainty—Succession Act (XXXIX of 1925), S. 328—Specific legacy—Co-owners—Adverse possession—Proof of ouster.*

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1. (1932) 63 M.L.J. 577.

* Appeal No. 199 of 1937 and C. M. S. A. No. 140 of 1937. 16th February, 1940.

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A provision in a will that certain named persons should take all properties found to belong to the testator and not shown in the will is a good residuary bequest.

Where the testator bequeathed to four persons certain items of properties and directed that "the same be kept as *tarwad* properties", but it was not made clear whether the legatees should take the properties as members of a *marumakkattayam tarwad* or as members of a Nambudri *tarwad*,

Held, that the bequest was void for uncertainty. Under S. 328 of the Succession Act apart from deductions necessary for debts and expenses a specific legacy must be delivered to the legatee without any abatement. If however the will indicated that another legacy was to be paid out of the funds included in a specific legacy that might create a charge thereon.

It is doubtful, whether the mere absence of a general fund out of which a general legacy can be paid would be sufficient to warrant the inference that that legacy was to be paid out of the funds earmarked as a specific legacy to others.

It is well established that the mere non-receipt by one co-owner of a share in the profits of land in the physical possession of another co-owner will not be sufficient to establish adverse possession, in the absence of positive indications that the co-owner in physical possession was setting up an adverse title to the knowledge of the other co-owner. The possession of the co-owner should be attributed to his lawful title unless there is a clear indication that he was openly asserting a title hostile to that of his co-owners. A mere secret intention on his part to hold the property as his own or to repudiate the will under which he got title, cannot rob another co-owner unaware of that intention of the right to benefit from his possession.

Corea v. *Appuhamy*, (1912) A.C. 230; *Gangadhar* v. *Parashram*, (1905) I.L.R. 29 Bom. 300 and *Varadapillai* v. *Jeevarathnammal*, (1919) 38 M.L.J. 313: L.R. 46 I.A. 285: I.L.R. 43 Mad. 244 (P.C.), relied on.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in O. S. No. 4 of 1932 and Appeal against the order of the District Court of South Malabar at Calicut dated 1st September, 1937 and made in C. M. A. No. 55 of 1935 (*Reference by the Official Receiver in I. P. No. 28 of 1931* M. P. No. 26 of 1932 Official Receiver's Court—Sub-Court, South Malabar).

Ch. Raghava Rao and *A. P. Kuttikrishna Menon* for Appellants in App. No. 199 of 1937 and Respondents in C. M. S. A. No. 140 of 1937.

B. Sitarama Rao and *M. C. Sridharan* for Respondents in App. No. 199 of 1937 and Appellants in C. M. S. A. 140 of 1937.

The Court delivered the following

JUDGMENT.—These appeals both raise questions relating to the will of a Parsi gentleman by name Nanabhai Hirjee who

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died on 30th June, 1916. Appeal No. 199 of 1937 is preferred by the plaintiffs who represented the interest of Nanabhai Hirjee's daughter, Meherbai Jehangir, the first plaintiff (who is now dead) being her husband; plaintiffs 2 to 7 are her children. They sued to recover a half share in a legacy given to Nanabai's widow Bhikaijee and also to recover Meherbai's share in specific properties which are items 9 to 12 in the will. We are no longer concerned with Bhikaijee's legacy which has been validly dealt with by Bhikaijee herself in a will which excludes Meherbai. The claim in the appeal is therefore confined to the four items 9 to 12 in the will Ex. A. This will is a somewhat unusual document. Nanabhai was a merchant trading in Calicut. The will Ex. A is dated 21st April, 1916. It enumerates firstly twelve items of property, items 1 to 6 being various movables connected with the trade, item 7 consisting of four Government promissory notes of the face value of Rs. 5,000, while item 8 is a site with the buildings thereon and their contents and the disputed items 9 to 12 are four parcels of immovable properties. These twelve items are valued at Rs. 95,300 and in addition to these items, the will recites the existence of certain bank balances and outstandings of unspecified value. Under the will, his estate was to be managed by the widow. The first provision is that the widow, the eldest son Framroze, the first defendant and the two sons of Framroze, Jal and Bomman, both of whom are now dead, shall possess equal rights to the properties shown as items 1 to 8. The next provision is that if the widow Bhikaijee dies without disposing of her share, that share shall go to the wife of Framroze and the testator's two daughters Meherbai and Dhannubai. Then follow three legacies of Rs. 5,000 one to the widow, one to Meherbai and the third to the other daughter Dhannubai. Meherbai has already got a decree for this legacy of Rs. 5,000. Next follow small legacies to employees and a recital that one of the promissory notes referred to in item 7 which is in the name of Framroze shall go to Framroze as beneficiary. Then after small bequests for charity and provision for funeral rites and tombs, the will provides that items 9 to 12 shall be retained unencumbered and unalienated in any way and that any such alienation shall be void. Then follows the sentence:

"The said four items of properties have been kept as *tarwad* properties."

And it is directed that out of the income from the business the *tarwad karnavan* Framroze shall meet the expenses for the

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maintenance of these items. After that provision for the creation of a *tarwad* to control these items, there follow certain minor provisions with which we are not concerned. Then comes the following sentence:

"All the properties that may be found to belong to me and that have been omitted to be shown herein should be taken possession of by my wife Bhikaijee, Framroze and the two grandsons in equal shares."

At the time of her father's death Meherbai was living at Hyderabad as the wife of a doctor practising there. There is no evidence that she was informed of the provisions of the will at the time of the testator's death and she was not paid anything under the will. In 1919 Framroze wrote a letter Ex. K-1 to Meherbai's husband referring to a claim for certain wedding presents of Meherbai which he repudiates. The letter concludes with the statement that in Nanabhai's will a sum of Rs. 750 is provided for Meherbai and is being kept at the desire of the testator for her children to be given at their marriage. This appears to refer to an earlier will which was superseded by Ex. A. It would appear that in 1921 Meherbai's husband got a registration copy of Ex. A and made a claim thereunder which was repudiated in a lawyer's letter Ex. L, dated 16th August, 1921, which says that the will is invalid and inoperative. This letter Ex. L is within twelve years of the present suit which was filed on 5th January, 1932. In 1921 and 1925 under Exs. II and III there were settlements by Framroze and his son Jal of properties got under the will and in 1928 Framroze and his son Jal mortgaged their properties to the Chalapuram Bank for Rs. 35,000. It does not appear that Meherbai ever received any part of the income of the properties covered by the will.

The learned Subordinate Judge who tried the suit held that it was barred by adverse possession, basing his decision on the absence of any claim to the properties, items 9 to 12 in the will, prior to 1921, the hostility between Meherbai's husband and the rest of the family and the alleged exclusion of Meherbai from the profits of the property taken along with the alienations made by the rest of the family. It should be mentioned that the arrangement made in the will for constituting a tarwad in respect of these properties has already been found to be invalid in a previous suit and the plaintiffs' claim was based on the assumption that there was an intestacy with regard to these four items. We find difficult

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to accept the conclusion of the learned Subordinate Judge that the plaint claim is barred by adverse possession. Assuming for the moment that the failure of this disposition in favour of the *tarwad* creates an intestacy, the result would be that Framroze and his children would be co-owners of these items along with the two sisters. Meherbai was living at Hyderabad; the other sister Dhanubai was living at Cannanore. Before 1921 there is, so far as we can gather, no positive evidence of the assertion of any hostile claim to these properties by Framroze and his children except such as can be spelt out of the exclusive enjoyment of the income of those properties. Very little weight can be attached to the omission of any reference to Meherbai's interest in these properties in Framroze's letter Ex. K-1. It is well established that the mere non-receipt by one co-owner of a share in the profits of land in the physical possession of another co-owner will not be sufficient to establish adverse possession, in the absence of positive indications that the co-owner in physical possession was setting up an adverse title to the knowledge of the other co-owner.

As was laid down by the Privy Council in *Corea* v. *Appuhamy*[1], possession is never considered adverse if it can be referred to a lawful title. It is not possible for the co-owner in possession, whose possession is deemed to be that of his co-owners, to put an end to that common possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result. In the present case Framroze was in lawful possession as a co-owner who along with his sons had a major interest in the property. His possession must be attributed to his lawful title unless there is some clear indication that he was openly asserting a title hostile to that of his co-owners. A mere secret intention on his part to hold that property as his own or to repudiate the will under which he got title, cannot rob another co-owner, unaware of that intention, of the right to benefit from his possession. Mr. Sitarama Rao, for the respondents has quoted the decision of the Privy Council in *Varadapillai* v. *Jeevaratnammal*[2], as an authority for the proposition that an ouster might be deduced from long continued enjoyment by one co-owner; but that was a case in which adverse possession had

1. (1912) A.C. 230.
2. (1919) 38 M.L.J. 313: L.R. 46 I.A. 285: I.L.R. 43 Mad. 244 (P.C.).

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started before the devolution which created the co-ownership. In the case of *Gangadar* v. *Parashram*[1], it was held that more than 40 years exclusive enjoyment without any participation in the profits or any demand for an account thereof might justify the presumption of actual ouster. There are no such circumstances in the present case. Nanabhai died in 1916 and it was not until 1921 that anything in the nature of a repudiation of the rights of Meherbai can be demonstrated. The mere exclusive enjoyment of the income of the properties for the five years preceding that repudiation is not, in our opinion, sufficient to justify the conclusion that during these five years, the possession of Framroze was openly hostile to the rights of his sister. It follows that the judgment of the learned Subordinate Judge is based on a wrong inference of ouster.

Mr. Sitarama Rao has, however, supported the decision on another ground which was not taken in the Court below, but which, in our opinion, must succeed. The attempt to create a perpetuity on the analogy of a Malabar *tarwad* in respect of these four items must be held to be invalid. Mr. Sitarama Rao contends that the effect of the invalidity of this disposition is not to create an intestacy regarding these four items, but to add these four items to the residue which under the terms of the will is to be enjoyed by the testator's widow, his son Framroze and his grandsons Jal and Bomman. That is to say, it has to be added to the estate which these same four persons got under the specific bequest of items 1 to 8. In our opinion, the provision that these persons should take all properties found to belong to the testator and not shown in the will, is a good residuary bequest. S. 102 of the Succession Act prescribes that a residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property. S. 103 provides that under a residuary bequest, the legatee is entitled to all property belonging to the testator at the time of his death of which he has not made any other testamentary disposition which is capable of taking effect and the illustration shows that when a legacy is void or has lapsed, the residuary legatee is entitled to such legacy. These statutory provisions merely codify certain well established rules of English law. In the case of *Blight* v. *Hartnoll*[2], the testatrix gave to *H* all her personal property

1. (1905) I.L.R. 29 Bom. 300. 2. (1883) 23 Ch, D. 218.

except a certain item the bequest of which failed for remoteness; it was held that that item fell into the residue and belonged to *H*. Jessel M. R. observes:—

"You may have a residuary bequest in various forms; the same thing may be meant though not expressed in the same words. But however it is expressed, the effect must be that it is intended to comprise all which is not disposed of by the will. It is not a true residue if there is some part not disposed of by the will to anybody at all.....When I say a residue I mean the residue of the estate not professed to be otherwise disposed of by the will."

Now the residuary clause of Ex. A purports to give the four legatees all the testator's properties that have been "omitted to be shown herein." The properties shown in the will are all covered by certain dispositions. It has been suggested by way of a reply to this contention that there is no disposition in the will of four items 9 to 12 in respect of which the testator made his ineffective attempt to create a *tarwad*. The argument is built upon the words:

" The said four items of property have been kept as *tarwad* properties."

The will is written in Malayalam. Though the Malayalam words naturally indicate a past act, they are capable of indicating a continuing act. There is no suggestion that there was any prior creation of a *tarwad* interest in these items apart from the will and in fact the plaintiffs themselves contended that it was the will which set aside the four items as *tarwad* properties and that this provision of the will was inoperative. We have no doubt that the use of the past tense in this sentence is without significance and that it was the intention of the testator to give these properties by his will to a *tarwad* of which, by the will, he nominated his son Framroze as a *karnavan*. This bequest is void not only as creating a perpetuity, but also for uncertainty. No one can tell from the words of the will whether the testator intended to give these properties to a *tarwad* formed on the analogy of a *marumakkathayam* family in which case the daughters would be sharers, or one founded on the analogy of a Nambudiri family, in which case the daughters would be entitled only to maintenance. We are of opinion that this will did purport to dispose of all the properties of the testator and that it did purport to make a disposition of items 9 to 12 which disposition is invalid. It follows that these items fall into the residue in which the plaintiffs have no interest. The suit therefore fails. It seems to us, however, that as the suit was dismissed in the Court below on an invalid

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ground and as the appeal has been resisted successfully on the basis of a legal contention not raised in the trial Court, the proper order is that each party should bear his own costs in appeal. With this provision Appeal No. 199 of 1937 is dismissed.

Civil Miscellaneous Second Appeal No. 140 of 1937.

Turning now to the Civil Miscellaneous Second Appeal, we have already stated that Meherbai got a decree for her legacy of Rs. 5,000. The decree was obtained in O. S. No. 42 of 1928 to which the mortgagee the Chalapuram Bank was not a party. After this decree was obtained Framroze and his son Jal were adjudged insolvents in I. P. No. 28 of 1931 on the file of the Subordinate Judge of Calicut. The Official Receiver proceeded to realise the assets and he has in his hands money representing the value of items 1 to 4 in the will. These items are bound by the mortgage in favour of the bank. They are also liable to satisfy the decree obtained by Meherbai in O. S. No. 42 of 1928. The question in the present appeal, which is preferred by the Bank, is whether under the will Meherbai's legacy is charged on items 1 to 4 and whether the decree for this legacy has priority over the claim based on the mortgage.

The matter seems to us to be capable of a simple solution. Under S. 213 of the Succession Act no right as legatee under a will to which the section applies can be established in any Court unless probate or letters of administration of the will under which the right is claimed have been obtained. Though this will has been established to be valid by the judgment in O. S. No. 42 of 1928 on the file of the Subordinate Judge of Calicut, that Court had no jurisdiction to grant probate or letters of administration and the will has not been formally proved. Meherbai's representatives have got a decree against the estate of the testator, which decree they are entitled to execute without relying upon the will. But the decree creates no charge. They can only spell out a charge by setting up a right under the will, which right cannot be established without probate, having regard to the terms of S. 213. On the other hand, the mortgagee has a security which he can enforce as against the mortgagors, who are estopped from denying their mortgagee's title. A similar estoppel operates against the Official Receiver who succeeds to the title of the mortgagors. It is therefore

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unnecessary for the mortgagee to prove, as against the mortgagors and the Official Receiver, the title which the mortgagor has got under the will. The bank, therefore can establish its position as a secured creditor and has priority over the simple decree holder.

Apart from this somewhat technical solution of the question we are clearly of opinion that under the terms of the will, the legacy in favour of Meherbai is not charged on items 1 to 8. The learned District Judge proceeds on the footing that items 1 to 12 in the will are exhaustive of all the properties of the testator and that as the will makes items 9 to 12 unalienable and attaches them to the *tarwad* his intention must have been that the legacies in favour of his widow and daughters should be satisfied out of items 1 to 8; and this conclusion is fortified by reference to the fact that one of the Government promissory notes included in item 7 is the subject of a separate bequest to Framroze, one of the persons entitled to the whole of items 1 to 8. It seems to us that the reasoning of the learned District Judge is fallacious. The legacy of items 1 to 8 to Framroze, his mother and his sons is a specific legacy. The legacy of Rs. 5,000 to Meherbai is a general legacy. Under S. 328 of the Indian Succession Act, apart from deductions necessary for debts and expenses, a specific legacy must be delivered to the legatee without any abatement. It is true that if the will indicated that another legacy was to be paid out of the funds included in a specific legacy, this might create a charge thereon. But the learned District Judge is definitely in error in his basic assumption that items 1 to 12 exhaust the whole of the property of the testator. There are the outstandings and the bank balances, the value of which we do not know, which are not included in items 1 to 12. Moreover it seems to us dubious whether the mere absence of a general fund out of which a general legacy can be paid would be sufficient to warrant the inference that that legacy is to be paid out of the funds earmarked as a specific legacy to others. In any view of the case, the Civil Miscellaneous Second Appeal must succeed. We allow the appeal with costs throughout and restore the order of the learned Subordinate Judge.

We wish to add that this decision will not prejudice any right which Meherbai's representatives may have to exclude the decree against items 9 to 12 which, by our finding in the

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connected appeal 199 of 1937, must be deemed to be part of the residue of the estate.

B.V.V. *Appeal No. 199 of 1937 dismissed;*
C. M. S. A. No. 140 of 1937 allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

Pandit Shiva Rao and another .. *Appellant** (*Applicants*)

v.

D. A. Shanmughasundaraswami (Official Liquidator) and others .. *Respondents* (*Respondents*).

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Registration Act (XVI of 1908), S. 17 (b) and 17 (1) (e)—Decree for sale of mortgaged property—Whether to be registered—Transfer of Property Act (IV of 1882), Ss. 59 and 100—Vendor's lien subsisting under S. 55 (4) of the Transfer of Property Act.

A final decree for sale on a simple mortgage must be regarded as immoveable property for purposes of Chapter III of the Transfer of Property Act.

Where the appellants conveyed for consideration to a Company, which went into liquidation later, certain lands and assigned thereby creating a charge on the lands and the benefit of a mortgage decree which they had obtained, but the deed not having been registered under S. 109 of the Companies Act and hence void against the liquidator and any creditor of the Company, the appellants claimed that they were entitled to rank as secured creditors by reason of the lien given to an unpaid vendor by S. 55 (4) of the Transfer of Property Act.

Held, (1) by virtue of amendment to S 17 of the Registration Act an assignment of a mortgage decree is placed in the same category as instruments falling within Cl. (*b*) and admittedly such instruments must be regarded as immoveable property and the assignment of mortgage decree was compulsorily registrable under S. 17 (1) (*e*) of the Act.

(2) that the appellants were entitled to a charge on the property conveyed.

Per Chief Justice. The mere fact that parties regarded the properties mentioned in the deed as being subject to a charge would not, by reason of provisions of Ss. 59 and 100 Transfer of Property Act, operate to create a charge in law. It could not be said that because parties entered into a contract, it deprived the appellants of the lien under S. 55 (4) of the Transfer of Property Act.

Case-law reviewed.

Per Patanjali Sastri, J.—A mortgage decree does not merely recite the pre-existing mortgage right. By its own force it declares even if it does not create, the decree-holder's right to have the property sold through the machinery of the Court for the realisation of his debt without any further impediment. It embodies the expression of the Court's will that a definite change

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*O.S.A. No. 71 of 1938. 18th August, 1939.

of the legal relation of the mortgagor to the property should forthwith be brought about by the property being sold in satisfaction of the decree. Shiva Rao v. Snanmugha-sundara-swami,

Baij Nath Lohea v. *Binoyendra Nath Palit* (1901) 6 C.W.N. 5; *Musammat Bhawani Kuar* v. *Gulab Rai* (1877) I.L.R. 1 All. 348; *Abdul Majid* v. *Muhammad Faizullah*, (1890) I.L.R. 13 All. 89; *Ahmad Khan* v. *Abdul Rahman Khan*, (1904) I.L.R. 26 All. 603 and *Mumtaz Ahmad* v. *Sri Ram and Bhavani Singh*, (1913) I.L.R. 35 All. 524, dissented from.

On appeal from the judgment and order of the Hon'ble Mr. Justice Gentle dated 9th September, 1938 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 876 of 1938 in O. P. No. 179 of 1936.

B. Sitarama Rao and *K. Vittal Rao* for Appellants.

D. A. Shanmugasundaraswami, Official Liquidator, first respondent in person.

V. Thyagaragan for *S. V. Shenoi* and *K. R. Shenoi* for Respondents.

The Court delivered the following.

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—The appellants appeal against an order refusing to recognise them as secured creditors of the Lakshmi Forest Company Limited, which is now under liquidation under an order for compulsory winding up. On the 3rd September, 1932 by a registered deed the appellants conveyed to the Company certain lands in the village of Shedimane, South Kanara District and assigned the benefit of a mortgage decree, which they had obtained in the Court of the Subordinate Judge of South Kanara. The consideration was Rs. 80,000 payable in instalments. The deed purported to charge both the immovable property and the mortgage-decree for the due payment of the balance of the consideration. It was also provided that the vendors should remit a sum of Rs. 10,000 if the Company should pay the balance falling due before the 1st April, 1933 with interest from the 30th June, 1932. The right to rank as secured creditors was challenged by the liquidator, and the appellants took out a Judge's Summons for a declaration that under the general law and also under the provisions of the deed they were secured creditors in respect of the monies remaining due to them under the deed. The deed had not been registered in accordance with the provisions of S. 109 of the Indian Companies Act, 1913, and was therefore clearly void against the liquidator and any creditor of the Company if put forward as embodying a charge. The appellants, however, claimed that they were entitled to rank as secured creditors by reason of the

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lien given to an unpaid vendor by S. 55 (4) of the Transfer of Property Act. This claim was disallowed by Gentle, J. The learned Judge held that they were not entitled to the statutory lien because the deed of conveyance contained a contract contrary to the provisions of S. 55 (4) in that it created without any allocation a charge on both movable and immovable property and under the section the appellants could only claim a lien in respect of immovable property. The appellants challenge the decision of the learned Judge on three grounds. In the first place it is said that the mortgage decree is not movable property, but immovable property. Secondly it is said that the conveyance did not in law effect any charge. In the third place it is said that even if the decree be regarded as movable property the appellants are entitled to a lien as equity had extended the principle of the vendor's lien to movable property of this description.

Before the amendment of S. 17 of the Indian Registration Act there was a conflict of opinion whether a mortgage decree could be regarded as movable or immovable property. In *Gopal Narain* v. *Trimbak Sadashiv*[1] the Bombay High Court held that the assignment of a mortgage decree required registration. The Calcutta and the Allahabad High Courts expressed opinions to the contrary. See *Gous Mahommad* v. *Khawas Ali Khan*[2], *Baij Nath Lohea* v. *Binoyendra Nath Palit*[3], *Ram Ratan Chuckerbutty* v. *Jogesh Chandra Bhattacharya*[4], *Abdul Majid* v. *Muhammad Faizullah*[5], *Ahmad Khan* v. *Abdul Rahman Khan*[6], *Mumtaz Ahmad* v. *Sri Ram and Bhawani Singh*[7]. This controversy has been decided in favour of the Bombay view by the addition made to the provisions of S. 17 of the Indian Registration Act by S. 10 of the Transfer of Property (Amendment) Supplementary Act, 1929, which came into force on 1st April, 1930. That Act added cl. (*e*) to sub-S. (1) of S. 17 of the Registration Act. The clause reads as follows:—

> "Non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property."

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1. (1876) I.L.R. 1 Bom. 267.
2. (1896) I L.R. 23 Cal. 450.
3. (1901) 6 C.W.N. 5.
4. (1907) 12 C.W.N. 625.
5. (1890) I.L.R. 13 All. 89.
6. (1904) I.L.R. 26 All. 603.
7. (1913) I.L.R. 35 All. 524.

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The wording here follows that used in cl. (*b*).

It has been argued by Mr. Thyagarajan on behalf of the second respondent that the Court is not justified in regarding a mortgage decree as immovable property by reason of the addition of cl. (*e*) to the section. He says that there has been no amendment of the definition of immovable property to be found in S. 3 (25) of the General Clauses Act and in S. 2 (6) of the Indian Registration Act and the considerations which weighed with the Calcutta and the Allahabad High Courts still apply. As I have already indicated, I am unable to accept the argument. By virtue of the amendment of S. 17 of the Registration Act an assignment of a mortgage decree is placed in the same category as instruments falling within cl. (*b*), and admittedly such instruments must be regarded as immovable property. When a final mortgage decree has been passed the document declaring the mortgagee's rights in the mortgaged property is the decree itself and not the mortgage deed. The decree gives the mortgagee something more than the deed. It finally establishes the mortgagee's right to have the property sold and directs that it be sold. The Civil Procedure Code contains a form for the drawing up of a final mortgage decree and unless the Legislature regarded the decree to be drawn up in accordance with such form as operating to declare the mortgagee's rights in the mortgaged property the amendment of the section would be idle. For the reasons indicated I hold that a mortgage decree must be regarded as immovable property.

I am also unable to share the opinion of the learned Judge that the conveyance of the 3rd September, 1932, created a charge, either as regards the lands or as regards the mortgage decree. S. 59 of the Transfer of Property Act requires a mortgage deed to be signed by the mortgagor, attested by at least two witnesses, and registered. S. 100 provides that where immovable property of one person is by act of parties or operation of law made security for the payment of money to another and the transaction does not amount to a mortgage the latter person is said to have a charge on the property and all the provisions "hereinbefore contained which apply to simple mortgage shall, so far as may be, apply to such charge." In *Tenneti Viswanadham* v. *M.S. Menon*[1], a bench of which I was a mem-

1. (1939) 1 M.L.J. 185: I.L.R. (1939) Mad. 199.

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ber held that the words "so far as may be" had not the effect of taking S. 59 out of the purview of S. 100. Unless given by statute a charge on immovable property can only be created by a registered instrument, executed by the person creating the charge and attested by at least two witnesses. In the present case the company was not a party to the deed of conveyance and as it has not created a charge by another instrument there is in law no charge at all. The mere fact that the parties regarded the properties mentioned in the deed as being subject to a charge would not, by reason of the provisions of Ss. 59 and 100 operate to create a charge in law. In these circumstances it cannot, in my opinion, be said that the parties had entered into a contract which deprived the appellants of the lien under S. 55 (4) of the Transfer of Property Act.

The appellants' contention that equity has extended the principle of the vendor's lien to movable property of certain descriptions is based on the judgments in *Mycock* v. *Beatson*[1], *Collins* v. *Collins*[2], In re *Albert Life Assurance Co.*: Ex parte *Western Life Assurance Society*[3], *Davies* v. *Thomas*[4] and In re *Stucley*: *Stucley* v. *Kekewich*[5], but holding, as I do, that a mortgage decree drawn up in the ordinary form, must now be regarded as immovable property and that the deed of the 3rd September, 1932, did not operate to deprive the appellants of their statutory lien under S. 55 (4) of the Transfer of Property Act it is not necessary to consider whether this argument is well founded, and if well founded the principle could be applied in India having regard to the provisions of the Sale of Goods Act.

The appeal succeeds on the first two points and consequently there will be a declaration in favour of the appellants that they are entitled to a charge on the property conveyed for the balance of the purchase money. The appellants are also entitled to their costs, which will be paid out of the assets of the company.

The Court has been informed that in other proceedings a creditor is claiming priority over the appellants, but this matter is not now before us and therefore cannot be inquired into.

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1. (1879) 13 Ch. D. 384.
2. (1862) 31 Beav. 346: 54 E.R. 1172.
3. (1870) 11 Eq. 164.
4. (1900) 2 Ch. 462.
5. (1906) 1 Ch. 67.

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To avoid any misunderstanding I will, however, add that our decision is entirely without prejudice to any claim to priority.

Patanjali Sastri, J.—The main question argued in this appeal is whether a final decree for sale obtained in a suit brought to enforce a simple mortgage of immovable property is to be regarded as immovable property for the purposes of Chapter III of the Transfer of Property Act relating to sale of immovable property. The facts giving rise to the question have been fully set out in the judgment of my Lord the Chief Justice and it is unnecessary to recapitulate them here.

The Transfer of Property Act does not define the term 'immovable property' except negatively by excluding standing timber, growing crops and grass. The General Clauses Act (X of 1897) contains a definition in S. 3 (25) which is applicable to the Transfer of Property Act. There is also a definition in S. 2 (6) of the Registration Act for the purposes of that Act. According to both these definitions so far as they are material to the present discussion, immovable property includes lands and benefits to arise out of land. We then have the definition of 'mortgage' in S. 58 of the Transfer of Property Act as the transfer of an interest in specific immovable property for the purpose of securing payment of money advanced, etc. This interest in the case of a simple mortgage consists of course in the right to bring the mortgaged property to sale for the realisation of the debt. A simple mortgage has thus a dual character. It is a debt with a right to be recouped from the sale proceeds of specific immovable property.

Now, it has been held in this Court, having regard to these definitions, that a debt secured by hypothecation of land is immovable property for the purposes of Ss. 54, 55 (2) and 123 of the Transfer of Property Act. See *Official Receiver, Trichinopoly* v. *Lakshman Aiyar*[1], *Balagurumurthi Chetti* v. *Ramakrishna Chetti*[2] and *Perumal Ammal* v. *Perumal Naicker*[3] and this position appears to have been accepted by their Lordships of the Privy Council in the recent decision in *Fanny Skinner* v. *Bank of Upper India, Ltd.*[4], where it was held that an assignment of a simple mortgage was of no effect

1. (1921) 41 M.L.J. 453. 2. (1921) 41 M.L.J. 267.
3. (1920) 40 M.L.J 25: I.L.R. 44 Mad. 196.
4. (1935) 69 M.L.J. 158: L.R. 62 I.A. 115: I.L.R. 57 All. 314 (P.C.).

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as a transfer of the security by reason of non-registration. But the question in what category a final decree for sale obtained on a simple mortgage has to be placed has not been the subject of decision in this Court, though there are conflicting decisions on the point in some of the other High Courts in India. Before referring to these decisions which are not however binding on this Court though, of course, they are entitled to great weight, it is desirable, in my opinion, to consider the question on principle. *Prima facie,* if a simple mortgage is to be treated as an interest in a land or as a benefit arising out of land and thus coming within the definition of immovable property, there seems to be no valid reason why a decree directing the enforcement of such mortgage should be regarded any the less as immovable property. Before the decree, the mortgagee had the right to bring the mortgaged property to sale through Court for the payment of his debt, or he could give up the security and sue for mere recovery of the debt. After the decree, however, he can no longer seek to recover the debt apart from realising the security and, unless the security proves insufficient on actual realisation, his only right, having regard to the provisions of the Civil Procedure Code in that behalf, is to bring the mortgaged property to sale in execution of the decree. Thus, the decree does not in any way affect the mortgagee's interest in the mortgaged property which still remains in him in full force, and indeed his remedy is now confined to a realisation of that interest, the mortgage-debt being, to that extent, deprived of its dual character. It is thus clear that the decree only marks a stage in the process of realising the security and the only change effected by it in the position of the mortgagee is to effectuate the benefit arising to him out of the land, the subject of the mortgage, by bringing it one step—and that an important step—nearer realisation. It is therefore difficult to see on principle why a final decree for sale should be relegated to a different category of property from the mortgage itself on which it is based.

Turning now to the decided cases, we find that the High Courts at Bombay, Allahabad and Calcutta have had occasion to consider this point. The earliest case in Bombay is *Hari Govind Joshi* v. *Ramchandra Pandurang Joshi*[1], where speaking of a

1. (1872) 9 Bom.H.C.R. 64.

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Court sale of a mortgage decree, the learned Judges observed that what was purchased,

"was not a mere paper on which the decree was written but the interest in immovable property which was recoverable under that decree and such interest must be regarded as immovable property within the meaning of S. 259 of the Civil Procedure Code."

In a later case in *Gopal Narayan* v. *Trimbak Sadashiv*[1], the same view was taken and it was held that an assignment of a mortgage decree was compulsorily registrable. The Calcutta High Court in the earlier case *Koob Lall Chowdhry* v. *Nittyanand Singh*[2], held that an unregistered deed of assignment of a mortgage decree was defective so far as it related to the mortgage lien on the property. In a later case, *Gous Mahomed* v. *Khawas Ali Khan*[3], however, that Court adopted the view that S. 17 (*b*) of the Registration Act does not apply to a deed of assignment of a mortgage decree as it could not be said to be immovable property within the definition contained in that Act. There is no reference to the earlier decision of the same Court and the learned Judges do not refer to the definition of a mortgage in S. 58 of the Transfer of Property Act as involving the transfer of an interest in specific immovable property. In a still later decision reported in *Baij Nath Lohea* v. *Binoyendra Nath Palit and another*[4], the question arose whether a mortgage decree was immovable property for the purpose of O. 21, r. 90 of the Civil Procedure Code, when a Court sale of such a decree was sought to be set aside under that provision. In this case, the definition of immovable property in the General Clauses Act was referred to and it was held that a mortgage decree did not come within that definition. Here again the earlier decision of the same Court in *Koob Lall Chowdhry* v. *Nittyanand Singh*[2], was not referred to. In the Allahabad High Court the treatment of the subject followed more or less the same course. In the earliest case in *Musammat Bhawani Kuar* v. *Gulab Rai*[5], the question arose whether the sale of a mortgage decree was a sale of movable property within the meaning of S. 252 of the Civil Procedure Code which provided that no irregularity in the sale of movable property under an execution shall vitiate the sale and it was held to be a sale of an interest in immovable

1. (1876) I.L.R. 1 Bom. 267.
2. (1883) I.L.R. 9 Cal. 839.
3. (1896) I.L.R. 23 Cal. 450.
4. (1901) 6 C.W.N. 5.
5. (1877) I.L.R. 1 All. 348.

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property. In *Abdul Majid* v. *Muhammad Faizullah*[1], however, the Court held that a deed of assignment of a mortgage decree did not come within the mischief of S. 49 of the Registration Act as it could not be regarded as immovable property. In the two later cases in *Ahmad Khan* v. *Abdul Rahman Khan*[2] and *Mumtaz Ahmad* v. *Sri Ram*[3], the decision in *Abdul Majid* v. *Muhammad Faizullah*[1], was followed. In none of these cases was any reference made to the earlier decision of the same Court in *Musammat Bhawani Kuar* v. *Gulab Rai*[4].

In this state of the authorities, the Legislature added cl. (*e*) to S. 17 (1) of the Registration Act by S. 10 of the Transfer of Property (Amendment) Supplementary Act, 1929, thereby making compulsorily registrable instruments transferring or assigning any decree or order of Court when such decree or order purports or operates to create, declare, assign, limit or extinguish any right, title or interest of the value of Rs. 100 and upwards to or in immovable property. It is clear to my mind that the object of this amendment was to affirm the Bombay view and supersede the Calcutta and Allahabad decisions referred to above holding the contrary. It is, however, urged that this newly added clause would not apply to mortgage decrees as the words, "purports or operates to create, declare, etc." must, in view of the Privy Council decision in *Bhageswari Charan Singh* v. *Jagarnath Kuari*[5], be construed to mean, "in itself purports or operates to create, declare etc.", whereas a mortgage decree merely declares a pre-existing right, that is, the mortgage right of the decree-holder. I think that this argument proceeds on a misapprehension of their Lordships' decision in the case referred to above. The distinction which their Lordships had in mind is the one between a mere recital of title as a fact and something which in itself creates a title. A reference to the passage from the judgment of West, J., in *Sakharam Krishnaji* v. *Madan Krishnaji*[6], which their Lordships quote with approval would make their meaning still more clear. The learned Judge there says:

"There (that is, in S. 17) 'declare' is placed along with 'create, assign, limit or extinguish a right, title or interest' and these words imply a definite

1. (1890) I.L.R. 13 All. 89.
2. (1904) I.L.R. 26 All. 603.
3. (1913) I.L R. 35 All. 524.
4. (1877) I.L.R. 1 All. 348.
5. (1931) 62 M.L.J. 296: L.R. 59 I.A. 130: I.L.R. 11 Pat. 272 (P.C.).
6. (1881) I.L.R. 5 Bom. 232.

Shiva Rao v. Shanmughasundaraswami.

Patanjali Sastri, J.

change of legal relation to the property by an expression of will embodied in the document referred to. I think this is equally the case with the word 'declare'. It implies a declaration of will; not a mere statement of fact."

A mortgage decree does not merely recite the pre-existing mortgage right. By its own force it declares, even if it does not create, the decree-holder's right to have the property sold through the machinery of the Court for the realisation of his debt without any further impediment. It embodies the expression of the Court's will that a definite change of the legal relation of the mortgagor to the property should forthwith be brought about by the property being sold in satisfaction of the decree. It seems to me, therefore, idle to contend that a decree stands on the same footing as a document containing merely a recital of an existing right. In one sense, no doubt, a decree or order of Court does not ordinarily bring into existence any right which did not already vest in one of the parties litigant and to insist that it should do so in order to come within cl. (*e*) of S. 17 would be to render that provision almost nugatory.

The assignment of a mortgage decree thus falls within S. 17 (1) (*e*), and must now be regarded as compulsorily registrable on the footing, clearly, that such a decree represents an interest in immovable property. It follows that much of the reasoning underlying the decisions of the Allahabad and Calcutta High Courts holding that a mortgage decree cannot be regarded as immovable property falls to the ground and I cannot, therefore, regard them useful precedents on the question now under consideration.

For the above reasons, I am of opinion that a final decree for sale on a simple mortgage must be regarded as immovable property for the purposes of Chapter III of the Transfer of Property Act.

On the other questions argued at the Bar, I agree in the conclusions of my Lord and have nothing material to add.

K. C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Ramakrishna Reddi and another .. *Appellants** (*Petitioners*)

v.

The Official Receiver of Bellary and another .. *Respondents.*

Ramakrishna Reddi *v.* Official Receiver of Bellary.

Provincial Insolvency Act (V of 1920), Ss. 37 and 43—Death of insolvent—Annulment of adjudication subject to vesting of property in receiver till payment of a specified creditor—Later application by other creditors for modification of order so as to include their debts also—Jurisdiction of Court.

An insolvent died in jail and his son moved the Court for annulment of the adjudication on the ground (1) that no application had been made for discharge within time allowed and (2) that the debts had all been satisfied. After notice to one creditor an order was made annulling the adjudication under S. 43 and directing that the property should vest with Receiver until payment of the active creditor. Three years later two other creditors applied to the Receiver for directions to pay them dividends out of the estate. The applications were rejected. The creditors then applied for the modification of the order under S. 37 so that the properties might vest in the Receiver until all the unpaid creditors had been paid under the insolvency law.

Held, when the Court has passed a particular vesting order, restricted in a specific way, it does not retain the power on some future date to pass a fresh order removing those restrictions and providing for an entirely new scheme for the distribution of the assets.

Veerayya v. *Sreenivasa Rao*, (1935) 69 M.L.J. 364: I.L.R. 58 Mad. 908 (F.B.), referred to.

The power of the Court must be taken to be confined to the power to give such directions as are necessary to carry out its intention. There was no jurisdiction to make the order asked for.

Appeal against the order of the District Court of Bellary dated 28th September, 1934 and made in I.A. No. 409 of 1934 in I. P. No. 4 of 1929.

V. S. Narasimhachar for Appellants.

T. M. Venugopala Mudaliar for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of the dismissal of an application for modifying an order passed under S. 37 of the Provincial Insolvency Act, vesting the properties of the quondam insolvent whose adjudication has been annulled. The facts are rather unusual. The insolvent was in jail as the result of a criminal conviction and he died in jail without applying for his discharge. His minor son applied for the annulment of the adjudication basing the application on two grounds (1) that no application had been made for discharge within time allowed

* A. A. O. No. 484 of 1937. 8th September, 1939.

and (2) that the debts had all been satisfied. The records show that notice was ordered to a vakil, apparently appearing for the only active creditor, and a report was called for from the Official Receiver. Thereafter the District Judge passed an order annulling the adjudication under S. 43 and directing that the property should vest with the Receiver until payment of the debt of Lakshmipathi—presumably the active creditor. This order was passed on 13th November, 1931. In 1934 the present appellants who represent two other creditors applied to the Receiver for directions to pay them dividends out of the estate. Their applications were rejected. Thereupon the application which gives rise to this appeal was filed on 3rd September, 1934, praying for the modification of the order under S. 37, so that the properties might vest in the Official Receiver until all the unpaid creditors had been paid under the Insolvency law. The ground upon which this relief was sought was an averment that there had been a fraud by the insolvent's son in giving notice only to one creditor and that he had taken advantage of the fraud to mortgage the properties and thereby cheat the other creditors. On this application the order of the learned District Judge was:

"I cannot do this The insolvency has been annulled. I have no jurisdiction over the estate except in accordance with that order."

At the time of this decision the ruling of the Full Bench of this High Court in *Veerayya* v. *Sreenivasa Rao*[1], was not yet available. What the Full Bench decides is that when on an annulment under S. 43 coupled with a vesting order under S. 37 the Receiver holds charge of the properties he continues to be subject to such directions of the Court with regard to the realisation and disposal of the properties as the Court may give in accordance with the principles, and policy of the Insolvency Act. It was also held that the power to control the Receiver should be exercised in the interests of the whole body of creditors and that the Receiver under S. 37 had only such powers as were necessarily implied by the vesting order. It is contended that the effect of this ruling is to enable the Court to pass a fresh order directing the Receiver to hold the properties, not merely for the satisfaction of the debt of the one creditor specified in the order, but for the satisfaction of the debts of all the creditors. I cannot accept this contention. It seems

1. (1935) 69 M.L.J. 364: I.L.R. 58 Mad. 908 (F.B.).

Rama-krishna Reddi v. Official Receiver of Bellary.

to me that the decision of the Full Bench clearly contemplates that the Official Receiver shall act under the directions of the Court which directions shall be for the purpose of carrying out the intention of the vesting order in administering the properties according to the principles of the Act. In the present case the vesting order explicitly prescribes that the property is to be held for the satisfaction of one particular debt only. It is not possible to contend that the order leaves it open for the Court to direct payments towards other debts, for that contention has already been canvassed by the present appellants and they have failed. As I read the decision of the Full Bench it provides no basis for the view that when the Court has passed a particular vesting order, restricted in a specific way, it retains the power on some future date to pass a fresh order removing those restrictions and providing for an entirely new scheme for the distribution of the assets. To my mind that cannot be done under the provisions of the Insolvency Act.

My attention has been drawn to the case of *Balla Mal* v. *Mst. Fatima Bibi*[1], which has been followed by a single Judge of this Court in the case of *Baluswami Naidu* v. *Official Receiver, Madura*[2]. This decision deals with the position when the Insolvency Court in annulling an adjudication by inadvertence omits to make a vesting order. It was held that in the interests of justice the Court can rectify its error. The power of Court is put on two grounds, (1) its inherent jurisdiction and (2) its power of review. With very great respect it seems to me that there are difficulties in using the theory of the Court's inherent jurisdiction to rectify errors, so as to justify the divesting of property which under the provisions of the statute has already vested in the insolvent. But, provided that the matter can be brought within the purview of O. 47, Civil Procedure Code, there is, so far as I am aware, no difficulty about the correction of the error by way of review.

It is suggested that the learned District Judge instead of holding that he had no jurisdiction to modify the present order should have treated the application as one for review and considered it on its merits. No doubt had a review application been presented on proper grounds and within the prescribed period of 3 months, the learned District Judge would have had jurisdiction to make such modifications in his order as were justifi-

1. (1934) I.L.R. 15 Lah. 698. 2. (1938) 1 M.L.J. 824.

Rama-krishna Reddi *v.* Official Receiver of Bellary.

ed in the circumstances. But the fact remains that the present application is not a review application; it does not purport to be a review application; it is not based on grounds such as would support a review application, and it is filed nearly 3 years after the order complained of without any application to excuse the delay so as to save limitation. In such circumstances I do not think that the learned District Judge can be blamed for treating the application as one claiming a right to get an apparently erroneous vesting order modified and a fresh vesting order passed merely because it has prejudiced the interests of certain parties whose views are alleged not to have been put before the District Judge at the time when the original order was passed. To my mind the learned District Judge had no jurisdiction to alter his own order merely because it is said to have worked hardship on some of the creditors. His powers in respect of that order must be taken to be confined to the power to give such directions as are necessary to carry out its intention. The application, the form in which it was presented being one which the District Judge had no jurisdiction to grant and not having been framed as an application for review, I do not see how the learned District Judge could have treated it as an application for review and assumed that the applicants would have some way of getting round the difficulties in respect of limitation and have given them an opportunity for redrafting their application and filing a further application to excuse the delay.

The order rejecting the application was to my mind a correct order and I dismiss the appeal. No order as to costs as the second respondent who alone objected has died and no legal representative has been put in his place.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Munirathna Gurukkal .. *Petitioner* (Petitioner.)*

Munirathna Gurukkal, *In re.*

Village temple—Right to management—Allowing archakas to manage small property of the temple—If right of management of villagers lost.

By merely allowing the archakas for some years to manage the small property of the temple, the villagers did not lose their right of management of the institution or even of its property.

* C. R. P. No. 218 of 1940. 26th February 1940.

Muniratbna Gurukkal, *In re.*

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the District Court of North Arcot dated 28-8-1939 in O.P. No. 15 of 1939.

K. Umamaheswaram for Petitioners.

The Court delivered the following

JUDGMENT.—There can be no doubt that after 1904, the villagers have been actively managing the suit institution. The presumption is, therefore, that even before that year they had the right of Management—or the petitioners would not have acquiesced in the loss of their authority. Moreover, the petitioners have on more than one occasion described themselves only as archakas, and have allowed others to be called dharmakarthas.

The villagers, by allowing the archakas for some years before 1904 to manage the small property of the temple, did not lose their right of management of the institution, or even of its property.

This petition is dismissed.

K. S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Kondayya Nayudu and another .. *Petitioners* (Plaintiffs-Decree-holders).*

v.

Marianan .. *Respondent (Defendant-Judgment-debtor).*

Kondayya Nayudu *v.* Marianan.

Civil Procedure Code (V of 1908), S. 60 (k)—Allowances of Railway guard—If exempt from attachment—Recoveries of advances made from Provident Fund—If to be deducted from attachable salary.

The allowances of a Railway guard over and above his salary are not exempt from attachment. Where the guard had taken an advance from the Provident Fund and that amount was being recovered from him at the rate of Rs. 10 a month, such recoveries are not deposits although they may be compulsory deductions or recoveries and there can be no deduction of this amount from the salary available for attachment.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the District Munsif of Erode dated 31st August, 1939 and made in E. P. No. 805 of 1939 in S.C.S. No. 71 of 1939.

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*C.R.P. No. 2120 of 1939. 21st March, 1940.

Kondayya Nayudu v. Marianan.

V. Ganapathi Ayyah and *R. Ramachandra Pant* for Petitioner.

A. Dorairaj for Respondent.

The Court delivered the following

JUDGMENT.—The respondent is a guard on the South Indian Railway and the petitioner is a creditor who applied to the Court for an order of attachment of a part of the guard's salary and allowances. An order was passed; but the Audit Officer, South Indian Railway, sent to the lower Court a report to the effect that the attachable amount of salary was Rs. 21-12-0, from which had to be deducted provident fund, Rs. 11-15-0, and provident fund advance, Rs. 10-0-0, the total of which two was greater than the attachable salary. He therefore said that no amount was available for attachment.

The learned Advocate for the respondent argues that the allowances of the guard should not be taken into account. They are, he says, compensation for the expense of travelling and having to buy his meals and sleep away from his home. I do not however find any reason for the exemption of allowances, and they are ordinarily included in the salary. There is no exemption of allowances in any of the clauses of S. 60, Civil Procedure Code. Under S. 60 (*k*) are exempted all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1925, applies, in so far as they are declared by the Civil Procedure Code not to be liable to attachment. It is suggested that allowances may be one of the "other sums" mentioned in the sub-section. The Provident Funds Act I of 1925 makes no mention of allowances. Moreover, the Audit Officer, in making his calculation, makes no distinction between salary and allowances. We may therefore take it that for the purpose of this revision petition, the salary of the respondent is Rs. 143-8-0.

Two further questions arise. The respondent had taken an advance from the Provident Fund and that amount was being recovered from him at the rate of Rs. 10 a month. The Audit Officer has deducted that amount as well as the ordinary provident fund deposit from the attachable income. The question is whether he rightly did so. The only clause under which it is said that such a deduction can be made is clause (*k*). Recoveries of advances made from the provident fund are certainly not deposits, although they may be compulsory

Kondayya Nayudu v. Marianan.

deductions or recoveries. It is however contended that such a recovery is made under the other and vaguer part of Cl. (*k*), "other sums in or derived from any fund to which the Provident Funds Act, 1925 applies". This Rs. 10 is not a sum in the Fund nor, in my opinion, can it be said to be a sum derived from the Fund. The guard had borrowed a sum of money from the provident fund which he was entitled to do under the rules and he thereby became a debtor to the Provident Fund. In paying this Rs. 10 a month he was only paying off a sum for which he was liable as a debtor; and the Provident Fund cannot claim to be in any better position than any other creditor with regard to that sum. I therefore do not find any basis either in S. 60 of the Civil Procedure Code or in logic or equity for the deduction of this Rs. 10 from the salary of the guard available for attachment.

The other question is with regard to the manner in which the calculation should be made. The learned advocate for the petitioner contends that from the salary and allowance of Rs. 143-8-0 should be deducted the provident fund contribution of Rs. 11-15-0 and that the remainder should be considered to be his salary. The attachable salary would then be half of Rs. 43-8-0 minus Rs. 11-15 0, (Rs. 31-9-0), which would be Rs. 15-12-6. S. 60 (*i*) of the Civil Procedure Code exempts salary to the extent of Rs. 100 and half the remainder, while an independent sub-S. (*k*) exempts compulsory deposits in the Provident Fund. These two sub-sections are independent and therefore, on reading these two sub-sections together, it would seem that the Legislature intended to exempt not only the salary up to Rs. 100 and half the remainder, but also, independently of it, such amount as is compulsorily deducted from the provident fund. Moreover, Rs. 131-9-0 (obtained by deducting Rs. 11-15-0 from Rs. 143-8 0) is not the respondent's salary. It is a sum representing the difference between the salary and the provident fund contribution. I have therefore no doubt that the Audit Officer of the South Indian Railway adopted the correct method of calculation, except that he wrongly deducted the monthly sum recovered on account of the advance.

It follows from the above that the petitioner is entitled to attach out of the respondent's salary a sum of Rs. 10-13-0. The revision petition is therefore allowed with half costs from the respondent, and E. P. No. 805 of 1939 on the file of the District

Munsif, Erode. The District Munsif should dispose of the petition according to the above findings.

Kondayya Nayudu v. Maraianan.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Pothera Kallur Veettil Narayanan Nambiar .. *Petitioner* (Petitioner)*

v.

Pothera Kallur Veettil Kunhathayi Amma and others .. *Respondents (1 to 5 and 7 to 35, 36 to 53 Respondents).*

Narayanan Nambiar v. Kunhathayi Amma.

Surety for proper administration of property—When can be released from the bond.

A junior member of a tarwad, who had executed a surety bond for the proper administration of tarwad affairs and properties by the karnavan, applied to be discharged from the bond on the ground (1) that he is not prepared to continue to remain bound and that he wanted to dispose of some of his properties and (2) that he had lost faith in his karnavan.

Held, the surety cannot be allowed to free himself of his own sweet will but must obtain leave of the Court And leave of Court can only be given for good cause, which would depend on the circumstances of each case.

Mahomed Ali v. *Howeson* (1926) M.W N. 493 (P.C.) followed.

Petition under S. 115 of Act V of 1908 and S. 224 of the Government of India Act praying the High Court to revise the order of the Court of the District Munsif of Taliparamba dated 17th December, 1936 and made in R. I. A. No. 944 of 1936 in O. S. No. 600 of 1934.

A. Achuthan Nambiar for Petitioner.

M. Govindan Nambiar and *C. Govindan* for Respondents.

The Court delivered the following

JUDGMENT.—This petition raises the question whether the petitioner, who was a surety for the proper administration of tarwad affairs and properties by the karnavan, is entitled to be discharged from the bond for the reason given by him. The petitioner is a junior member of the tarwad, who of his own accord stood surety and executed the bond for Rs. 2,000. It is not pretended that he executed this bond owing to any mistake of fact or misrepresentation or in circumstances of the like nature. The reason given by him is that he is not prepared to

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* C.R .P. No. 1168 of 1937. 29th March, 1940.

Narayanan Nambiar v. Kunhathayi Amma.

continue to remain bound and that he wants to dispose of some of his properties. Here in this Court the learned Counsel on his behalf adds another reason, namely, that he has lost faith in his karnavan. In effect it comes to this: the petitioner wants to be released because he wants to be released and does not like to remain bound.

It is well settled now that in the case of a bond like this a surety cannot release himself or discharge himself from the bond of his own sweet will, but must obtain leave of the Court. See *Mahomed Ali Mamojee* v. *Howeson Brothers*[1], in which their Lordships of the Judicial Committee saw no reason for differing from the conclusion arrived at by the High Court of Calcutta to this effect, namely that a surety could not free himself from his liability without the consent of the Court. Reference may also be made in this connection to *National Guarantee & Suretyship Association* v. *Prayag Deb Banerji*[2] and In the goods of *Nani Lal Das deceased*[3]. In the Allahabad case it is pointed out that leave of the Court could be given for good cause, but no attempt is made to indicate exactly what "good cause" would be. Naturally it would depend on the circumstances of each case, and it would not be easy to define "good cause" in a perfectly satisfactory way. In this case, as observed already, there is no cause shown except that the petitioner has changed his mind. That obviously cannot be regarded as good cause, because it would mean that he could free himself from his liability without leave of the Court, the leave of the Court becoming a pure formality. The lower Court has gone as far as possible to meet the wishes of the petitioner by saying that he would be released if he finds other satisfactory security. His present contention practically amounts to this, that he must be allowed to free himself of his own sweet will. This is exactly what he cannot do, as has been held in *Mahomed Ali Mamojee* v. *Howeson Brothers*[1]. The petition therefore must be dismissed with costs of respondents 1 and 2.

K. S. *Petition dismissed.*

[END OF VOLUME]

1. (1926) M.W.N. 493 (P.C.).
2. (1931) I.L.R. 54 All. 293.
3. I.L.R. (1939) 2 Cal. 1.

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THE FEDERAL COURT OF INDIA.

[Appellate Jurisdiction]

PRESENT :— SIR MAURICE GWYER, C.J., SIR SHAH SULAIMAN AND SIR S. VARADACHARIAR, JJ.

ON APPEAL FROM THE HIGH COURT AT PATNA.

Surendra Prasad Narain Singh .. *Appellant* *

v.

Sri Gajadhar Prasad Sahu Trust Estate and Others .. *Respondents.*

Government of India Act (1935), S. 205 (1)—Certificate that case involved a question as to constitutional validity of a Provincial enactment—Subsequent repeal of the impugned Act and reenactment with Governor-General's consent—Jurisdiction of Federal Court to hear the appeal—Applicability of new Act—New grounds if can be allowed to be taken—Bihar Money-Lenders Act, 1939, S. 7—Suit based on Chithas—Chithas if document on which loan is based.

Subsequent to the grant of certificate under S. 205 (1) of the Government of India Act, the Bihar Money-Lenders Act, 1938, was repealed and replaced by the Act of 1939. Objection was taken to the maintainability of the appeal.

Held, the certificate under S. 205 (1) of the Government of India Act does not become void or inoperative owing to the impugned legislation having been repealed and replaced by a new one. Nor can there be any question of getting it vacated. The right to appeal to the Federal Court accrued on the grant of the certificate and thereafter the only forum of appeal available to the appellant was the Federal Court and his right to go to the Privy Council, with or without special leave disappeared.

As a special case, the Federal Court has power to grant leave under S. 205 (2) of the Government of India Act for taking new grounds of appeal (here the availability of the new enactment to the appellant) and can also take account of the new Act, *suo motu.*

For the balance of the price due on the sale of immovable property an account was opened in the plaintiff's books for Rs. 1,000 in September, 1911. There were some subsequent advances and also the amount due on two hundies for Rs. 2,000 was brought into the same account. In fasli 1320 the account was signed and from that date the interest payable on the account was by agreement between the parties increased from 14 annas to Re. 1 per cent. per mensem. The accounts continued up to 12-10-1929 (fasli 1336). Though the total amount of the loan advanced was only about Rs. 3,700 and about Rs. 4,953 had been paid by way of interest the acknowledgment on 12-10-1929 showed Rs. 11,249-9-9 as due from the defendants. Plaintiff sued for the amount with interest. It was contended on behalf of the debtor that in view of S. 7 of Bihar Act VII of 1939 the plaintiff, having received as interest an amount exceeding the principal, was not entitled to any further sum for interest and that the amount should be calculated on the footing that Rs. 3,700 was the principal amount.

Held, (1) the mere mention of interest being payable at a particular rate and the implied promise to pay the principal cannot make the entry a "bond." (2) The *chithas*

*Case No. 9 of 1939. 18th March, 1940.

sued on cannot be regarded as a document on which a loan can be said to have been based or which evidences a loan and the plaintiff will be entitled to claim only Rs. 3,700.

M H Malik with *Rai Inder Behari Saran*, instructed by *T K Prasad*, (Agent), for the Appellant.

Baldeva Sahay (*Advocate-General, Bihar*) with *Raghbir Singh* and *A. C. S Chari* instructed by *G. Sahay*, (Agent), for Respondent No. 1. The other Respondents not represented.

Sulaiman, J :—It is submitted before us on behalf of the respondents that the new Bihar Money-Lenders (Regulation of Transactions) Act, (Act VII of 1939), which has received the assent of the Governor-General, cannot be impugned on the ground of any repugnancy. But it is contended that this Court cannot, or at any rate should not, apply the new Act to this appeal. The appellant had invoked S 11 of the old Money-Lenders Act, but could not possibly rely on the new Act before the High Court as the judgment was pronounced on the 3rd of January, 1939, and the certificate also granted on that date, while the new Act, which received the assent of the Governor-General on the 15th April, 1939, was not published in the Gazette till the 1st May, 1939. Although the certificate had been granted, the appellant made a supplementary application in the High Court for leave to appeal to the Federal Court, which had stated the grounds of objection, but this also was made before the last-mentioned date. The appellant did, however, rely on the new section in his petition of appeal, dated the 18th August, 1939, lodged in the Federal Court, and therefore complied with Order XII, Rule 5, F C R In the circumstances the appellant cannot now be tied down to the grounds mentioned in his supplementary application to the High Court for obtaining the leave.

As regards the new S 13, which the appellant can invoke in the First Court even if the Federal Court were not to interfere, it was pointed out in *Shyamkant Lal* v *Rambhajan Singh and Others*[1] that although this Court was not bound to take the new Act into account, it had certainly power to do so. The wordings of the new S. 7 are more imperative and prevent a Court in any appeal or revision also from passing a decree for an amount of interest in excess of that specified. Although this Court would not itself pass a decree in this case, nevertheless, it may remit the case to the High Court with a declaration as to the judgment and decree which are to be substituted for the judgment and decree appealed from; and the judgment and decree of the High Court now to be passed shall have to be in strict conformity with the provisions of the new S 77. It is, therefore, all the more necessary that this Court should not ignore the coming into force of the new provisions, which would bind the High Court when the decree comes to be passed If this Court were to ignore the new Act altogether the appellant would have no remedy left, as the High Court would not be able to give to the appellant the relief he is entitled to under that section. Without any direction from his Court the High Court would not be able to modify

1. (1939) F.C.R. 193, at pp. 216-7: (1939) 2 M.L.J. Supp. 45.

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its own preliminary decree, which was passed when the old Act was in force, unless S 7 were widely interpreted so as to apply to the final decree and also avoid its being at variance with the preliminary decree

It is argued that the High Court had granted a certificate that the case involves a question of interpretation of the Government of India Act, bearing on the validity of the old Bihar Money-lenders Act; but as that Act has been repealed, no question of any such interpretation now remains for consideration; and so the appeal is no longer maintainable. But the certificate has not become void or inoperative owing to the Provincial legislation having been repealed and replaced by a new one. Nor can there be any question of getting it vacated. The appellant is still asserting the validity of the old Act, which governed the rights of the parties on the date when the High Court decided the appeal When the certificate was duly granted his right to appeal to the Federal Court on that point undoubtedly accrued. Thereafter under S 205 (2) the only forum of appeal available to him was the Federal Court and his right to go to the Privy Council, with or without special leave, disappeared. Once the door of the Federal Court was opened to the appellant, it cannot be shut against him on the double ground that he can no longer rely on the certificate because the old law has been replaced by a new one, and he cannot rely on the new law because to avail himself of the new law he must get the certificate vacated, and then go to the Privy Council If this Court is not prepared to consider the old section, because it has been not only repealed, but replaced, by a new section, then it must consider and apply the latter, unless it can dispose of the appeal on some other shorter ground As a special case, the Federal Court has also power to grant leave for taking such a ground under S. 205 (2) of the Government of India Act, and can also take account of the new Act *suo motu*

The High Court conceded, or at any rate assumed, that if the provisions of the old S. 11 had been applicable, the plaintiffs could not have got a decree for more than the principal amount because the total amount of the loan advanced has been about Rs. 3,700 only while the amount repaid by way of interest was Rs 4,953 The plaintiff respondent relies on the last words of S. 7, *viz.*, "no Court shall ... pass a decree for an amount of interest ... . , which .. .. is greater than the amount of loan advanced, or, if the loan is based on a document, the amount of the loan mentioned in, or evidenced by, such document". They contend that the suit is based on *chithas* and, therefore, the Court cannot go behind the amount of the loan mentioned in and evidenced by the last *chitha*.

The Bihar Money-Lenders Act contains several definitions 'Principal' is defined in S 2 (*h*) as meaning in relation to a loan the amount actually lent to the debtor; whereas under S 2 (*d*) 'interest' means rate of interest, including the return to be made over and above what was actually lent Under S. 2 (*f*) 'loan' means

(1) an advance;

(*a*) whether of money;

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(*b*) or in kind, on interest made by a money-lender,

(2) including a transaction on a bond bearing interest executed in respect of past liability; and

(3) any transaction which, in substance, is a loan, with two exceptions which are not relevant here

The explanation makes it clear that a bond bearing interest executed in respect of goods taken on credit constitutes a loan, but a supply of goods on credit is not a loan. Thus a 'loan' is a wider word than the principal amount actually lent, as it may be an advance in cash or kind, or may be a transaction on a bond bearing interest executed in respect of past liability, or may be any transaction which is substantially a loan Interest that accrues is not an advance of money, but can become a loan if liability to pay it is undertaken in a 'bond'.

As the same word 'loan' has been used in S. 7, it should bear the meaning given to it by its definition. But the definitions in S 2 are themselves subject to the condition "unless there is anything repugnant in the subject or context". The term 'loan' although wider than the term 'principal' is obviously used at three places in the same S 7, in contradistinction to 'interest' used therein Indeed, the section itself uses both the words 'loan' and 'interest' in two different senses. When the same section talks of the amount of interest separately and aims at reducing it, it is reasonable to infer that loan would not necessarily include the interest on it. The section applies to a suit brought in respect of "a loan advanced," and the interest to be decreed is not to exceed the amount of "the loan advanced" or if "the loan" is "based on a document", the amount 'mentioned in or evidenced by' it The words in S 7 are not the total amount of debt mentioned, but the 'amount of the loan advanced or based on a document'. Had the intention been to refer to the total amount, including principal and interest mentioned in any document, it would have been made simpler to use some other word like claim or debt. Interest would be included in the loan only if its amount is entered in the document on which the loan is based

Unfortunately the expression "if the loan is based on a document" used in S 7, is rather unhappy and liable to create an ambiguity. Ordinarily one speaks of a claim being based on a document and not a loan being based on it The concluding words, however, make the meaning clear as they refer to the amount of loan (*i*) mentioned in or (*ii*) evidenced by such document Presumably by the expression "the loan based on a document" is meant the loan which has a document for its title-deed, on which the suit may have to be brought to recover it. The words in the old S. 11, after the word 'document'; which have been deleted now, were "on which the suit is based" Those words were likely to suggest that for the purposes of the total amount of the loan, the document which created a fresh cause of action for the suit was conclusive That would have included accounts stated and adjustments (which give rise to a fresh cause of action), though probably not acknowledgments. Presumably it was to remove the possi-

Sulaiman, J.

bility of such a construction that the Legislature has deleted those words The addition of the words "or evidenced by it" does not alter the position in any way for the governing words that still remain are "if the loan is based on a document .... the amount of the loan".

In the definition of 'loan' the first category, *viz.*, "an advance, whether of money or in kind, on interest" obviously excludes interest. The respondents rely on the second category of transactions mentioned in the definition. But there too the words "bearing interest" suggest the distinction between loan and interest, in spite of the fact that the words "in respect of past liability" are wide enough to include liability for past debt, whether principal or interest. The transaction has to be on a "*bond* . . .. . executed in respect of past liability." The third category of "any transaction which, in substance, is a loan" may for instance possibily include a promise to pay unpaid purchase money or promise to pay a sum of money for some other good consideration, but not a mere acknowledgment of interest due, unless it also amounts to a renewal of a bond In consequence of S 2 (*f*) the word 'document' used in S. 7 obviously means the 'bond' referred to in the definition of loan, as that is inseparably involved in the definition itself, so far as past liability for interest is concerned.

The term 'bond' has not, however, been defined either in the Act or in the General Clauses Act Two definitions of it are to be found in Indian Acts S. 2 (3) of the Limitation Act (Act IX of 1908) defines 'bond' as including "any instrument *whereby* a person *obliges* himself to pay money to another, on condition that the obligation shall be void if a specified Act is performed, or is not performed, as the case may be". S. 2 (5) of the Indian Stamp Act (Act II of 1899) defines 'bond' as "(*a*) any instrument *whereby* a person *obliges* himself to pay money to another, on condition that the obligation shall be void if a specified Act is performed, or is not performed, as the case may be; (*b*) any instrument attested by a witness and not payable to order or bearer, *whereby* a person *obliges* himself to pay money to another; and (*c*) any instrument so attested, *whereby* a person *obliges* himself to deliver grain or other agricultural produce to another."It will thus be seen that the essential common feature of these definitions is 'any instrument whereby a person obliges himself'.

In England the word 'bond' is sometimes taken in a wider sense, but there too the instrument must ordinarily bind the obligor for the payment of a sum of money to the obligee In *Mozley and Whitley's Law Dictionary,* 5th Edition, 1930, page 42, it is stated to mean "an instrument under seal, whereby a person binds himself to do or not to do certain things". In *Stroud's Judicial Dictionary*, 2nd Edition, page 204, 'bond' is stated to mean "an obligation by deed" On the other hand, in *Whartons' Law Lexicon,* 14th Edition, page 137, a 'bond' is stated to mean "a written acknowledgment or binding of a debt under seal," and at page 308, 'deed' is defined as "a formal document on paper or parchment duly signed, sealed and delivered "

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The definitions in the two Indian Acts make it still clearer that the instrument itself must oblige the obligor to the obligee, that is to say the language of the instrument itself must expressly create the obligation. Although the word 'bond' has not been defined in the Money-Lenders Act, it is fair to infer that the word has been used in it in the sense commonly understood in this country in view of the definitions in the Indian Acts, and not in the wider sense so as to include accounts stated, adjustments or acknowledgments. It, therefore, seems to me that an instrument cannot be a "bond" unless it contains an express obligation undertaken by the executants to pay or deliver goods. If the promise to pay is to be inferred by implication, then the document may amount to acknowledgment of liability or adjustment, or even account stated, but would not be a bond.

As pointed out by the High Court (p. 33 of the Paper Book), "At the close of every *mahajani* year when accounts were adjusted an acknowledgment for the amount found due (including interest) was written out and signed by the debtors and a *chitha* for the next *mahajani* year opened with its top lines only written and signed by them" For the last *chitha* (Exs. 1*z* and 1*z* (*a*) dated the 24th Asin, 1936, corresponding to 12th October, 1929, which only was within three years of the suit, there were the following words: "Wrote out *chitha* for 1336 Fs. It is correct (Sd.) Surendra Narayan Singh By my own pen". Two stamps of two annas each were affixed at this place. This particular endorsement did not contain any express promise to pay the amount nor any stipulation to pay interest As noted by the High Court, below this writing the formal *chitha* was prepared by the plaintiff's servant in these words: '*Chitha* for 1336 Fs., prepared in favour of Babu Gajadhar Prasad Sahu . . interest payable at 1 per cent per mensem ...... " Then followed the transactions for 1336 Fs. These included on the credit side the balance brought over from 1335 Fs as well as the interest that accrued during 1336 Fs , and on the debit side four small payments. Then a balance was struck up to the 24th Asin 1336 Fs. amounting to Rs, 11,249-9-9 Below this, two stamps of two annas each were affixed and the following endorsement was made: "Rupees eleven thousand two hundred forty-nine, annas nine and pies nine only is due to me up to 24th Asin, 1336, the end of the Mahajani year . (Sd) Surendra Narayan Singh. By my own pen " In the account prepared by the plaintiff's Munim the rate of interest payable had certainly been noted; but in the endorsement signed by the debtor there was no express stipulation to pay such interest, although that also must be deemed to have been implied

The *chithas* form a series of entries in the plaintiff's account books. In order to make the last portion of S. 7 applicable against the defendant, the plaintiffs have to argue that the document referred to in the section must here mean the *chitha* on the last page of the defendant's account in the plaintiff's account book. As there were cross entries in the plaintiff's accounts, and the payments made were entered on the debit side and deducted from the amounts on the credit side, and then a final balance struck, it

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is obvious that the entry at the bottom of the last *chitha* was not a mere acknowledgment of liability like the endorsement at the top, but that it was a record of an adjustment and an account stated *Siqueira* v. *Noronha.*[1] It, therefore, follows that there was, by necessary implication, a promise to pay the amount due with interest, although with the exception of the words "due by me" there were no other words which could convey an express promise to pay. *Bishun Chand* v *Girdhari Lal* [2]

The point, however, is clear that in the year 1929, long before the Money-Lenders Act was in contemplation, the intention of the parties was simply to adjust their accounts showing the balance brought over from the previous year, the interest that had accrued during the year and the reduction on account of the payments made in that year. The amount of the stamp duty paid, though not by itself conclusive, also furnishes some indication that it was not the intention of the parties to get a fresh bond executed with an express promise to pay the amount due Under Art. 15 of Sch. I of the Stamp Act the duty payable in respect of a bond is at the rate of Rs 2-8 per Rs 500 or part thereof for sums exceeding Rs. 1,000 The stamps of two annas each that were affixed to the *chithas* show that the parties contemplated the recording of an acknowledgment of liability after an adjustment of accounts, or of an account stated, and not the execution of any formal bond, with an express promise to pay, which would have required a higher stamp duty

The entries at the top and at the bottom were admittedly separated by a year's interval, and the middle entries were certainly not simultaneous with the first, and need not necessarily have coincided in time with the latter The entries made by the plaintiff's Munim in the *chitha* are in the third person and do not read like the recitals in a bond executed by the defendants. On the other hand, the endorsement at the top and the entry at the end are in the first person, which profess to have been made by the debtor himself. It is, therefore, impossible to treat the whole document as one bond The transaction as evidenced by the last *chitha* does not really go any further than the account stated The document itself shows that the sum of Rupees eleven thousand two hundred and forty-nine annas nine and pies nine, was not the loan advanced, but was the principal sum plus interest that had accrued during the previous years, minus all payments that had been made during the past years. The last *chitha* itself separately specifies the amounts for one year. Of course the mere mention of a figure in a document is not always absolutely conclusive as it remains open to the executants to show that in reality the full consideration mentioned therein had not actually passed. Much less would the sum total noted in the *chitha* make it conclusive that the whole of it was the loan.

The intention of the Provincial Legislature in enacting S. 7 read with S. 2 (*f*), which draw a distinction between loan and interest, appears to be to accept the amount of the loan mentioned or evidenced by a document,

1. (1934) 67 M.L.J. 103: A.I.R. 1934 P.C. 144 (P.C.),
2. (1934) 67 M.L.J. 110: 61 I.A. 273: 56 All. 367 (P.C.).

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if the loan is based on such a document and amounts to a transaction on a bond bearing interest and duly executed But when a statement of account, not amounting to a bond, itself shows that the whole of the amount mentioned therein is not a loan, but part of it is professedly interest, that interest cannot be accepted conclusively as a part of the loan within the meaning of S. 7.

The question then simply resolves itself into this: Can the endorsement made by the defendant at the bottom of the last *chitha* be regarded as "a transaction on a *bond* bearing interest executed in respect of past liability"? It seems that such a construction would be contrary to the intention of the parties The last *chitha* cannot, therefore, be treated as a bond within the scope of the definition of "loan" in S. 2 (*f*) Accordingly, the amount entered in the last *chitha* cannot be regarded as the minimum amount behind which the Court cannot go and which it must assume to be the loan In this view the first portion of the section comes into play and the Court is debarred from granting a decree for an interest in excess of the principal amount of the loan. As interest in excess of that amount has already been paid, the plaintiffs can have a decree for the principal amount advanced and no more.

The last point urged by the appellant is that the Court should reopen the transaction under S 8 of the new Act In the first place this point, which was covered by S. 12 of the old Act, does not appear to have been pressed before the High Court; and without a special leave of the Federal Court, as referred to in S. 205 (2) of the Government of India Act, it cannot be raised in appeal. In the second place, the point really becomes wholly unnecessary if the plaintiffs are to get a decree for the principal amount only and not for any interest.

I would accordingly allow the appeal and remit the case to the High Court with the declaration that the following decree be substituted for the one appealed from:—

"The appeal be allowed, the decree of the trial Court modified and the plaintiff's suit decreed for the principal sum (about Rs. 3,700) only and his claim for past interest disallowed, with *pendente lite* interest at 6 per cent per annum, and future interest on the consolidated amount at the same rate."

Varadachariar, J:—This is an appeal, by the first defendant, against a decree for money passed by the Courts below against the appellant and his undivided coparceners Amongst the contentions urged on the defendants' behalf, before the High Court at Patna, there was one based upon S 11 of the Bihar Money-Lenders Act, 1938, which limited the amount of interest which a money-lender was entitled to claim. The High Court rejected this contention, in the view that it had taken in prior cases, that S 11 of the Bihar Act of 1938 was void, on the ground of repugnancy to existing Indian legislation This appeal has been preferred to this Court, on a certificate, granted under S 205 of the Constitution Act, to the effect

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that the case involved a substantial question of law as to the interpretation of that Act

Before us, the appellant's learned counsel relied upon the decision of this Court in *Jagadish Jha* v. *Aman Khan*,[1] and contended that, apart from the question of the validity of S 11 of Bihar Act III of 1938, the debtors were in any event entitled to claim the benefit of S. 7 of the Bihar Money-lenders (Regulation of Transactions) Act, 1939 (VII of 1939), which had been passed after the decision of this case in the High Court and had in substance reproduced the provisions of S. 11 of the Act of 1938 with retrospective effect. As the earlier case before this Court had been heard *ex parte*, the learned counsel for the respondent desired, and was permitted, to urge certain contentions against the view taken in that case as to the right of a debtor in similar circumstances to claim the benefit of the new Act. A question was also raised as to the extent of the benefit which the defendants would be entitled to on the true construction of S 7 of the new Act.

The objection to the right of the appellant to claim the benefit of the new Act in the proceedings before this Court was raised not only in this appeal, but in three other cases which were heard in course of January and February this year With a view to facilitate a full argument of this objection, we agreed to defer pronouncing our judgment till all the four appeals had been heard. Some aspects of this objection have been dealt with in the judgment in case No. 13 of 1939[2] and in my learned brother's judgments in this case and in case No. 10 [3] It was also urged in some of the cases that as the contention based on the new Act had not been mentioned as a ground in the proceedings taken in the High Court, even after the new Act came into force, the appellant ought not to be permitted to raise it here This argument ignores the provision of S. 205 of the Constitution Act The certificate was granted by the High Court when the Act of 1938 was in force and there was no necessity or occasion to raise before the High Court in subsequent proceedings the contention based on the new Act Once the appeal is before this Court, it is open to this Court to grant leave to the appellant to raise particular grounds of appeal It must also be observed that the contention based on the new Act is not really a ground of appeal against the decision of the High Court, because the new Act was not in existence at the time of that decision. As explained in the judgment in *Shyamakant Lal* v. *Rambhajan Singh and Others*,[4] it is this Court that takes cognisance of the new Act, with a view to do justice between the parties, as the new Act has been made retrospective. It was suggested in one or two cases that the validity even of S 7 of the new Act was open to challenge, but the objection was not pressed.

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1. (1939) 3 F.L.J. 7.
2. *Subhanand Chowdhary* v. *Apurba Krishna Mitra*, (1940) 1 M.L.J. Supp. 23: (1940) 3 F.L.J. 58.
3. *Jai Gobind Singh* v. *Lachmi Narain Ram*, (1940) 1 M.L.J. Supp. 14: (1940) 3 F.L.J. 46.
4. (1939) 2 M.L.J. Supp. 45: (1939) F.C.R. 193.

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The contention of the learned counsel for the respondents as to the effect of the application of S 7 to the case was based on the nature of the dealings between the parties and of the accounts maintained by the creditor in respect of the same. The transactions between the parties, so far as they are relevant to the present case, began, in September, 1911, with a purchase of immovable property by one Iswardhari Singh, the undivided uncle of the appellant, from the plaintiff's predecessor in title Out of the sale price of Rs 2,900, Rs. 1,900 was paid in cash and for the balance of Rs. 1,000 an account was opened in the plaintiff's books (Exhibit I series) Two days later, there was an advance of Rs. 115; and there were a few advances during fasli 1319 In fasli 1320, a sum of Rs 2,000 due under two hundies drawn by Iswardhari Singh in favour of the same creditor was brought into the same account In fasli 1320 the account was signed not only by Iswardhari Singh, but also by two of his undivided younger brothers, one of whom was the father of the second defendant From this date, the interest payable on the account was, by agreement between the parties, increased from fourteen annas to one rupee per cent. per mensem. The accounts continued up to 12-10-1929, that is, the end of the *Mahajani* year corresponding to fasli 1336. Though the only subsequent advance by the creditor seems to be a sum of Rs. 5 paid in cash in fasli 1334, the receipt side of the accounts shows several items of payments from time to time. The way that the account books were maintained has been described in the judgment of the High Court as well as in the judgment just delivered by my learned brother. The result of the account was that though the total amount of the loan, including the unpaid balance of the purchase money, was only about Rs. 3,700 and an amount of about Rs 4,953, had been paid by way of interest, the acknowledgment on 12-10-1929 showed that a sum of Rs. 11,249-9-9 was then due from the defendants to the creditor. [*Vide* entry marked Exhibit I (*z*) (*a*)]. It may be mentioned in passing that it was stated before us by the learned counsel for the respondent that in the *chitha* for fasli 1336, not merely the heading but the whole of the page was in the handwriting of the first defendant In the view that we take of the case, nothing turns upon this circumstance.

On the facts above stated, it was contended on behalf of the appellant that as the creditor had already received towards interest an amount exceeding the principal, the plaintiff was not, in view of S. 7 of the Bihar Act VII of 1939, entitled to any further sum for interest up to the date of the institution of his suit and that the amount now payable by the defendants should be calculated on the footing that a sum of only Rs 3,700, *i.e*, the principal amount, was due at the date of the institution of the suit In the plaint, the sum due from the defendants had been calculated on the basis that Rs. 11,249-9-9 was due on 12-10-1929; adding a claim for compound interest at 12 per cent per annum with annual rests, the plaint, which was filed on 20-8-1932, claimed Rs. 15,713-4-6 with further interest.

S 7 of Bihar Act VII of 1939 provides that in respect of interest payable up to the date of the institution of the suit, the Court shall not pass a decree for an amount "which together with any amount already realised as interest . . . . is greater than the amount of loan advanced or, if

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the loan is based on a document, the amount of loan mentioned in or evidenced by such document." With reference to the concluding words of the section above set out, it was argued on behalf of the respondent that, in the present case, the *chitha* entry, Exhibit I (*z*) (*a*), dated 12-10-1929 which has been signed by the first defendant should be regarded as "the document on which the loan is based" and that the plaintiff was accordingly entitled to treat the sum of Rs. 11,249-9-9 there shown as "the amount of loan" within the meaning of S 7 of the Act. If that contention were accepted, the appellant would not of course be entitled to any relief in this appeal, because the interest claimed between 12-10-1929 and the date of the institution of the suit did not exceed the amount mentioned in the document It was in this connection urged that the *chitha* entry Exhibit I (*z*) (*a*) should be held to amount to an "account stated" between the parties and as such to furnish a separate cause of action for the recovery of the money there shown as due In support of this contention the learned counsel for the respondents relied on the decisions of the Judicial Committee in *Siqueira* v *Noronha*,[1] and in *Bishun Chand* v. *Girdhari Lal*,[2] and on certain observations of the Lahore High Court in *Narain Das* v. *Miran Baksh and Others* [3]

The authorities cited on behalf of the respondents themselves recognise the distinction between cases in which a statement of account signed by the debtor may be intended to be only an admission of the correctness of the account or a mere acknowledgment of a debt and cases in which it may be an "account stated" in the real sense [*See* also the antithesis recognised in O. XX, r 8, of the English Supreme Court Rules.] Whether a particular statement of account falls in the one category or in the other is a question to be determined with reference to the circumstances of each case. An examination of the *chithas*, Exhibit I series, in the present case leads me to think that the signed entry at the end of each year followed by a corresponding entry at the commencement of the next year could only have been intended to serve as an admission by the debtors of the correctness of the account which was maintained by the creditor. Except on this hypothesis, there was little significance in going through this process *every* year. In this view, the last entry, Exhibit I (*z*) (*a*) dated 12-10-1929 could have no greater significance than the corresponding entries in the *chithas* of the earlier years. It has not been suggested or shown that *at the time* when that entry was made, it was intended to be anything like a final closing of the accounts between the parties, so as to put the debtors' liability on a new basis So far as one can see, it was merely an accident that the accounts stopped with fasli 1336, probably because the creditor died about the end of 1929 or early in 1930 and his estate soon became the subject-matter of litigation (Probate case 24 of 1930). The legal significance of a set of accounts closely resembling Exhibit I series in the present case was considered by *Jenkins, C.J* , and *Woodroffe, J.*, in *Galstaun* v. *Hutchison*,[4]

1. (1934) 67 M.L.J. 103: L.R. 1934 A.C. 332.
2. (1934) 67 M.L.J. 110: L.R. 61 I.A. 273: I.L.R: 56 All. 376 (P.C.).
3. (1924) I.L.R. 5 Lah. 406.
4. (1912) I L.R. 39 C. 789.

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and the learned Judges held that the signed entries in the *bahi chithas* would not even amount to an "acknowledgment of a debt" within the meaning of Art I of the Indian Stamp Act, 1899. It is not necessary for us to go so far; but the observations of *Woodroffe, J* , in that case may be usefully referred to in this connection It may also be mentioned, for what it is worth, that the Courts below relied on the signed entries in the accounts only as "acknowledgments" sufficient to save the bar of limitation, [*vide* the discussion of issues 2 and 5] If Exhibit I (*z*) (*a*) had been regarded as an "account stated" in the true sense, no question of limitation would have arisen at all, as the suit was instituted within three years of Exhibit I (*z*) (*a*)—vide Art 64 of the Indian Limitation Act.

Even if it should be assumed that Exhibit I (*z*) (*a*) represents an "account stated" between the parties, that does not seem to me to be decisive of the question under S. 7 of Bihar Act VII of 1939. The respondents can press into service the concluding words of the section only if it can be said that Exhibit I (*z*) (*a*) is "the document on which the loan is based". This expression is, to say the least, not very happy, but interpreting it in the light of the definition of "loan" in S. 2 (*f*) and of the scheme of the Act, it is not very difficult to gather the meaning intended. In attempting to include in the definition of "loan", documents executed in respect of a past liability (as distinguished from a contemporaneous advance), the legislature used the expression "transaction on a bond . . executed in respect of a past liability" Here again, the expression "transaction on a bond" is perhaps open to criticism and I am not sure if the word "bond" in this context was intended to be limited to a formal deed or to documents of the kind specified in the definition of "bond" in the Indian Stamp Act But I am unable to believe that mere debit entries or balance entries in accounts (even though signed by the debtor) could have been intended to be comprised in the expression "transaction on a bond". It seems to me at least necessary that the document relied on should have been intended to embody the contract between the parties and should *ex facie* show a promise or undertaking to pay before it can be spoken of as a "bond" The Indian law has clearly emphasised the distinction between a promise to pay and a mere statement or acknowledgment of liability (*see* the antithesis in Art I of the Indian Stamp Act and the way that an I.O.U is dealt with in the illustrations to S 4 of the Negotiable Instruments Act). The decision in ***Narain Das* v *Miran Baksh and Others***,[1] seems to me to have gone too far in holding that book entries of balances signed by the defendants would amount to a "bond" within the meaning of Art. 67 of the Indian Limitation Act. The definition of "bond" in S. 2 (3) of that Act clearly implies that the document must be one "whereby a person obliges himself to pay money to another". I am unable to concur in the view that the mention of interest being payable at a particular rate and the possible implication therefrom of a promise to pay the principal would suffice to bring the account-entry within the category of "bond" (*cf.*

1. (1924) I.L.R. 5 Lah. 406.

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observations of the Judicial Committee in ***Muhammad Akbarkhan*** v. ***Attar Singh,***[1] where dealing with the definition of a "promissory note" their Lordships stress the distinction between an ordinary undertaking to pay and one which has only to be inferred or implied) Readig the words "if the loan is based on a document" in S 7 of the Bihar Act in the sense above indicated, it cannot be held that the entry I (*s*) (*a*) in this case is a "document on which the loan is based", because it merely says "Rs. 11,249-9-9 is due by me up to 24th Asin 1336 "

The learned counsel for the respondents based an argument on the difference between the words employed at the end of S 7 of the Act of 1939 and the words occurring in the corresponding provision (S. 11) of the Act of 1938; it is not easy to follow that argument. The earlier Act fixed the limit at the amount of loan mentioned in "the document *on which the suit is based*" while the Act of 1939 speaks of the amount of loan "mentioned in or evidenced by such document." The use of the expression "such document" is of course an improvement, as this portion of the section is introduced by the words "if the loan is based on a document" But it is not easy to state what distinction the legislature had in mind when, in the later Act, it referred to *two* alternatives, by the words "mentioned in" and "evidenced by" respectively In *Singheshwar Singh and others* v *Medni Prasad Singh and others,*[2] the learned Judges of the High Court have endeavoured to state a possible explanation, in the light of what was mentioned to them by the Advocate-General of Bihar. I do not find it necessary to express any opinion on that statement, because, in either alternative, the amount to be taken note of is the amount of *loan* and the word "loan" must be understood in the light of the definition clause already referred to. It must also be borne in mind that in both the Acts this portion of the section is introduced by the same opening words "if the loan is based on a document".

Even if it were possible to regard the accounts in this case as the document on which the loan is based, it does not seem to me possible or reasonable to confine our attention, as the learned counsel for the respondents invited us to do, to the particular entry marked Exhibit I (*s*) (*a*). The account books must be taken *as a whole* and as the entries therein clearly show what items represent principal and what items interest, the Court must arrive at the "amount of the loan" by excluding the items that represent only interest. The scheme of the Bihar Money-Lenders Acts emphasises the distinction between liability in respect of the principal and liability in respect of of the interest and whether a party relies on the words "mentioned in" or on the words "evidenced by" at the end of S. 7 of the Act of 1939, the "amount of loan" must be determined with reference to the whole document and not by confining attention to a particular entry.

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1. (1936) 71 M.L.J. 712: L.R. 63 I.A. 279: I.L.R: 17 Lah. 557 (P.C.), at p, 568.

2. A.I.R. 1940 Pat. 65.

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I am for the above reasons unable to accede to the respondents' contention that the sum of Rs 11,249-9-9 shown in Exhibit I (*z*) (*a*) should be taken as the starting point for the determination of the extent of the defendants' liability even under S 7 of Bihar Act VII of 1939. The plaintiff will only be entitled to claim up to the date of the plaint the sum of Rs 3,700 or such other sum as the parties may agree or the High Court may on the accounts find to represent the principal amount due. On this sum, the plaintiffs will be entitled to simple interest at 6 per cent. per annum from the date of the plaint to the date of the decree to be passed by the High Court From that date, the aggregate amount due for principal and interest will carry interest at 6 per cent per annum.

The decrees of the High Court and of the Trial Court are set aside except in so far as they relate to costs. The High Court will pass a revised decree in the light of the foregoing directions. The defendants will remain liable for the costs awarded against them by the decree of the Trial Court and the original decree of the High Court. There will be no order as to the costs of this appeal.

Gwyer, C.J:—I concur, and only desire to add a few words. S. 7 of the Act of 1939 is no doubt extremely obscure and ill-drawn; but if the Advocate-General's contention were correct, I should find it difficult to understand why, in an Act plainly intended for the relief of debtors, money-lenders should have been presented with so simple a method of circumventing it. I should for this reason be unwilling to accept his contention, unless the language of the Act left me no alternative In my opinion that is not so I agree that it is impossible to regard the record of transactions which was kept by the parties in the present case as a document on which a loan can be said to have been based or which evidences a loan; and I think that the words in S. 2 of the Act, "transaction on a bond bearing interest executed in respect of past liability", ought in any case, having regard to the manifest intention of the Act, to be strictly construed

I agree with the order proposed to be made.

K. S. *Appeal allowed.*

[Appellate Jurisdiction.]

SIR MAURICE GWYER, C.J. SIR SHAH SULAIMAN AND SIR S. VARADACHARIAR, JJ.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT PATNA.

Jai Gobind Singh and Others .. *APPELLANTS**

v.

Lachmi Narain Ram and Others .. RESPONDENTS.

Practice—Federal Court—Exercise of jurisdiction by High Court—When interfered with in appeal by Federal Court—Bihar Money Lenders Act, 1939, S. 8—Power to re-open settled accounts—Only discretionary—Interest pendente lite—Power

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*Case No. 10 of 1939. March 18, 1940.

altogether for loans advanced [redacted], as regards previous loans, S. 7 [redacted] the principal, and S. 8 gives [redacted] reliefs according to circumstances. [redacted] "may" it is intended that the Court [redacted] of each case and then decide whether it should [redacted] exercise all or any of the three powers mentioned in the section. [redacted] the intention been as contended for on behalf of the appellants, the language would have been 'the Court shall exercise all or any of the following powers'. The use of the word "may" indicates that the Court is not bound to exercise at least one of the powers and may well not exercise any of the powers at all. The language as it stands can mean only this that the Court has the discretion to exercise all or any or none of the specified powers.

A further point has been urged on behalf of the respondents that the new S. 7 is *ultra vires* of the Provincial legislature. The argument is as follows:—Quite apart from any question of repugnancy, which is cured by the assent of the Governor-General, S. 7 has been enacted to reduce interest on all loans including loans based on a document. Now a loan based on cheques, bills of exchange, promissory notes and other like instruments, would be a loan based on a document within the meaning of the section and would be governed by the prohibition contained in it. But "cheques, bills of exchange, promissory notes and other like instruments" fall under List I, Entry No. 28, of the Seventh Schedule, and are within the exclusive powers of the Federal legislature. By virtue of S. 100 read with S. 316, it follows that the power of the Provincial Legislatures to make enactments in respect of these documents is wholly excluded. If the provisions of S. 7 would be void in such particular cases, then the whole section must be deemed to be altogether void.

Although one of the previous debts had in part been based on a promissory note, the present suit is based on a mortgage deed and not on a promissory note and the field is therefore apparently clear. The period of limitation being short, S. 7 would rarely apply to suits on promissory notes. It is accordingly unnecessary to consider the objection in detail in this case, particularly as the point does not directly arise, nor has it been fully argued

of [illegible] money also included the interest on th[illegible]ge. The special provision in O. XXX[illegible] the general provision in S. 34. Till the peri[illegible]ter was considered to remain in contract and the inte[illegible]at the rate specified in the contract. *Jagannath Prosad* [illegible]*ry* v. *Surajmul Jalal and others.*[2]

By Act XXI of 1929, O. XX[illegible] was amended, and a new r. 11 was inserted, which deals specially with interest, and provides that the Court "may" order payment of interest to the mortgagee up to the date fixed for payment at the rate payable on the principal. It follows that this special provision, which removes any conflict that there might have been between S. 34 and O. XXXIV, rr. 2 and 4, gives a certain amount of discretion to the Court, so far as interest *pendente lite* and subsequent interest are concerned. It is no longer absolutely obligatory on the Courts to decree interest at the contractual rate up to the date of redemption in all circumstances, if there be no question of the rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918. See *Sripat Singh and Others* v. *Naresh Chandra Bose and Others,*[3] although in this case when considering O. XXXIV, r. 2, the Privy Council case of *Jagannath Prosad Singh Chowdhury* v. *Surajmul Jalal and others,*[2] was overlooked. In *Jagdish Jha and others* v. *Amar Khan*[4] interest after the institution of the suit was ordered by this Court to be paid at the rate of 6 per cent. per annum on the principal amount till the date fixed for payment. In my opinion the view then taken as to the power of a Court to reduce interest *pendente lite* was not contrary to law.

The Bihar Legislature, as shown by the Preamble of Act III of 1938, in order to give relief to debtors has inaugurated a new policy by regulating money-lending transactions. S. 6 makes any contract for the payment of compound interest after the Act came into force altogether void. S. 7 disallows interest upto suit in excess of the amount of the principal. S. 8 gives power to the Court to re-open the whole transaction and give relief in respect

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1. (1939) 1 M.L.J. 272: I.L.R. (1939) Mad. 151 (F.B.).
2. (1926) 52 M.L.J. 373: L.R. 54 I.A. 1: I.L.R. 54 Cal. 161 (P.C.).
3. A.I.R. 1932 Pat. 332 at p. 334.
4. (1939) 3 F.L.J. 7 at p. 9.

Sulaiman, J.

of interest in excess of 9 per cent. simple per annum in the case of a secured loan notwithstanding any contract to the contrary. The power of the Court to reduce interest in Bihar has, therefore, become much wider than that under the Usurious Loans Act. It may not be quite in harmony with these new provisions to go back to the old practice or the old standard of high rates of interest, which were freely allowed. It may even be contrary to the spirit of the Bihar Act now to allow compound interest at a high contractual rate not only during the pendency of the suit but even up to six months after the preliminary decree to be passed hereafter.

Of course, whether the Court would or would not give relief in respect of interest in excess of nine per centum simple per annum, and if so to what extent, will depend on the special circumstances of each case. The opinion of the High Court on such a matter must carry weight, where, being conscious of its discretionary power under S. 8, it has considered the case not to be a fit one for the exercise of such power. Just as in Case No. 13[1] decided to-day, the *pendente lite* interest should be reduced to 12 per cent. per annum simple.

Varadachariar, J.—I wish to add a few words, with reference to the argument urged on behalf of the appellants as to the manner in which S. 7 of Bihar Act, VII of 1939, should be applied to one of the loans sought to be recovered in this case. The appellants also sought to invoke the aid of S. 8 of that Act, with a view to re-open the settlement of accounts made at the time of the execution of the mortgage bond, Exhibit V. But, as held by the High Court, that section only gives a discretionary power and we have not been shown sufficient reason for interfering with the refusal of the High Court to exercise that power in the circumstances of this case. It is true that in the particular paragraph dealing with this queston, the learned Judges have not assigned their reasons; but the reasons are fairly gatherable from the rest of the judgment.

The suit comprised claims under two mortgage bonds, Exhibit V, dated 4th October, 1923, and Exhibit V (*a*), dated 24th April, 1930. The interest due under Exhibit V (*a*) up to the date of the institution of the suit did not amount to a sum equal to the principal amount of the bond; no question therefore arises under S. 7 of Bihar Act VII of 1939, in respect of that bond. The earlier bond, Exhibit V, had been executed to secure repayment of a sum of Rs. 2,500, and it provided for the payment of compound interest with annual rests at Rs. 1-1 per cent. per mensem. This amount of Rs. 2,500 was made up of a sum of Rs. 1,500 received in cash to pay off another creditor of the mortgagors and a sum of Rs. 1,000 treated as paid to the mortgagees themselves in discharge of antecedent debts due to them from the mortgagors. The bond gave particulars of the antecedent debts; and after reciting that the amount due up to that date for principal and interest in respect of those debts was Rs. 1,047, it provided for the payment of Rs. 1,000 out of the mortgage loan towards that amount.

1 *Subhanand Chowdhary* v. *Apurba Krishna Mitra,* (1940) 1 M.L.J. Supp. 23: (1940) 3 F.L.J. 58.

Varadachariar, J.

With reference to Exhibit V, the learned counsel for the appellants contended that, even under S. 7 of Act VII of 1939, the Court must re-open the account in respect of the antecedent debts referred to in Exhibit V, and limit the interest claimable by the plaintiffs up to the date of the suit, in respect of this portion of the mortgage debt, to the amount of principal due under the antecedent transactions. I am unable to accede to this contention. The case is certainly one of a "loan based on a document"; and under the concluding words of S. 7, interest is in such a case claimable up to the "amount of loan mentioned in the document". The loan document must in this case be taken to be Exhibit V, and not the earlier documents referred to in it, because the definition of "loan" in S. 2 (*f*) includes a "transaction on a bond executed in respect of past liability". How exactly this definition and the provision of S. 7 are to be applied to ordinary cases of "renewals" it is not necessary for the purposes of this case to decide. Where however, as in the present case, the parties settle accounts in respect of a pre-existing liability and agree that money borrowed under a later transaction, even from the same creditor, should be applied in discharge of that pre-existing liability, it seems to me that the later transaction should in law be regarded as a loan by itself, though cash did not actually pass between the parties by way of lending and repayment: [see observations of Greer, L.J., as he then was, in *Lyle* v. *Chappell*[1] referred to with approval by the Judicial Committee in *S. R. M. S. Chedambaram Chettiar* v. *Loo Thon Poo*[2]].

The appeal is allowed and the decree of the Courts below modified to this extent, *viz.*, that the interest payable to the plaintiffs up to the date of the institution of the suit in respect of Exhibit V, will be limited to Rs. 2,500. The question of interest *pendente lite* has been dealt with in case No. 13 of 1939[3]. On both the bonds, the principal amounts will carry simple interest at 12 per cent. per annum from the date of the institution of the suit to the date fixed for payment in the revised decree to be passed by the High Court. After that date, there will be interest at 6 per cent. per annum on the aggregate amount of principal, interest and costs up to date of realisation. The case will be remitted to the High Court for a revised decree being passed on the above basis. The plaintiffs-respondents will retain the costs awarded to them by the decrees of the High Court and of the Trial Court. There will be no order as to costs in this Court.

The appellants' learned counsel applied for an order under S. 10 of the Bihar Act of 1939, permitting payment by instalments. The appellants will be at liberty to make the application before the High Court which has to pass the decree.

Gwyer, C.J.—I concur and have nothing to add.

K. S. *Appeal allowed.*

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1. (1932) 1 K.B. 691.
2. (1940) 1 M.L.J. 68 at p. 72.
3. *Subhanand Chowdhary* v. *Apurba Krishna Mitra*, (1940) M.L.J. Supp. 23: (1940) 3 F.L.J. 58.

[Appellate Jurisdiction.]

PRESENT:— SIR MAURICE GWYER, C.J., SIR SHAH SULAIMAN AND SIR S. VARADACHARIAR, JJ.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT PATNA

Birendra Prasad Sukul and Others .. *Appellants**

v.

Surendra Prasad Sukul and Others .. *Respondents*

Bihar Money-Lenders Act (VII of 1939), S. 7—Suit to enforce the share of liability of a co-debtor under a mortgage—"Amount of loan mentioned in document"—If whole mortgage amount or the share only.

In a suit to enforce a mortgage against a creditor in respect of his share of the debt the debtor claimed the benefit of S. 7 of the Bihar Money-Lenders Act (VII of 1939). The plaintiff contended that the whole amount mentioned in the mortgage deed, should be taken as the principal amount and an amount equal to that can be awarded as interest up to date of the suit under S. 7.

Held, the only reasonable interpretation of the section is to read it as referring to the claim brought against the particular defendant who is sued and the amount which is due from him alone and is the subject matter of the claim.

Rajeshwari Prasad instructed by *G. Sahay,* Agent, for the Appellants

Raghbir Singh with *P. P Varma,* instructed by *T. K. Prasad,* Agent, for the Respondents.

Sulaiman, J :—This is a mortgagors' appeal arising out of a suit brought to enforce a mortgage, dated the 1st January, 1915, executed by Debindra Prasad Sukul, defendant No. 4, and Birendra Prasad Sukul, defendant No 1 for Rs. 100,000 carrying interest at 0-8-0 per cent. per mensem compounded every second year The present plaintiffs were by inheritance entitled to only 2|6th share in the mortgage deed. The rest has gone to the defendants The Courts below have found that there was a legal necessity for Rs 25,000 only which represented an unpaid purchase money for properties taken by both, while Rs. 25,000 went into the pocket of Debindra alone The plaintiffs had discharged Debindra Prasad and his sons from all liability and sued to enforce the mortgage against the half share of Birendra and his sons The amount claimed in the plaint was 1|6th of Rs. 100,000 plus corresponding interest. The Courts below have passed a decree for Rs 12,500 (1|6th of Rs. 75,000) and interest at contract rate up to the date fixed for payment in the decree. The defendants' plea that section 11 of the Bihar Money-Lenders Act, 1938, should be applied was rejected by the High Court on the ground that the section had been held by a Full Bench to be void.

S 11 of the old Act has now been replaced by S. 7 of the new Act (Act VII of 1939), the applicability of which is governed by our Ruling in Case No 9 of 1939, *Surendra Prasad Narain Singh* v. *Gajadhar Prasad Sahu Trust Estate and Others,*[1] decided to-day

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*Case No. 12 of 1939. March 18, 1940.

1. (1940) 1 M.L.J. Supp. 1: (1940) 3 F.L.J. 27.

Sulaiman, J.

If the principal sum due from the defendants-appellants were taken to be Rs 12,500, and if the principle of S. 7 were to apply and the plaintiffs are to be given interest up to the date of the suit, not exceeding the principal sum, then the total amount due up to the 26th April, 1929, when the suit was brought would be Rs. 25,000 only According to the accounts as appended to the decree of the first suit, the amount of principal and interest calculated up to that date exceeds Rs. 28,000. It is contended on behalf of the appellants that this amount should be reduced to Rs. 25,000.

The learned advocate for the plaintiffs, however, contends before us that as the sum of Rs. 100,000 is mentioned in the mortgage deed, the maximum limit for the award of interest is that figure, and therefore the amount awarded by the Courts below, being well below it, cannot be reduced It seems difficult to accept this argument, when the plaintiffs themselves have broken the integrity of the mortgage and split up the liability.

Reading S. 7 of the new Act as a whole, it is quite obvious that it deals with a suit brought by a money-lender (against the defendant who is sued) in respect of a loan advanced (to the defendant sued against) in which a decree has to be passed (against the defendant who is sued) the amount of interest allowed prior to the suit not exceeding the amount of the loan advanced (to the defendant sued against) or if the loan (due from the defendant sued against) is based on a document, the amount of the loan (due from the defendant sued against) mentioned in or evidenced by such a document. It could not have been the intention of the legislature that if there are several executants who have borrowed various sums and the creditor sues one of them for his separate share only, having already realized the balance from the others, then the maximum prescribed for the amount of interest to be decreed against him is not to exceed the aggregate of the various sums borrowed by him as well as all the other *pro forma* defendants, who are not really being sued. The only reasonable interpretation to put on the section is to read it as referring to the claim brought against the particular defendant who is sued, and the amount which is due from him alone and is the subject matter of the claim.

The construction sought to be put on the section on behalf of the plaintiffs would frustrate the object in view In the present case, on the findings of the Courts below, the principal amount for which the contesting defendants were liable, is only Rs 12,500 and no more This is therefore the only amount, apart from interest, for which the decree can be passed against them The mortgage-deed was wholly invalid in respect of Rs 25,000 as against them. In my judgment it will be in accord with the intention of the Provincial legislature as disclosed by the various provisions in the Act for the reduction of interest to interpret the section so as to give relief to the defendants in respect of the interest which they would otherwise be liable to pay. I am, therefore, of the opinion that the plaintiffs are entitled to have a decree for the principal sum of Rs 12,500 and a total interest Rs. 12,500 up to 26th April, 1929, when the suit was filed, plus *pendente lite* and future interest as ordered by the High Court.

Varadachariar, J.

Varadachariar, J. :—I wish to add a few words with reference to the contention urged by the learned counsel for the respondents on the application of S 7 of the Bihar Act of 1939 to the circumstances of this case. That section limits the interest claimable up to the date of the plaint to the "amount of loan mentioned in the document". As Rs. 1,00,000 is the amount mentioned in the mortgage bond in the present case, the learned counsel argued that the plaintiffs were entitled to claim full interest as per terms of the bond, so long as it did not exceed Rs. 1,00,000. I am unable to accede to this contention On the plaintiffs' own showing, the liability of the appellants to the plaintiffs was only to the extent of one-sixth of the total liability and the total amount of the loan has for the purposes of this suit been found to be only Rs. 75,000 Though the respondents' contention has the merit of plausibility and ingenuity, it seems to me that on a reasonable interpretation of the section, the appellants' liability for interest up to the date of the institution of the suit must be limited to Rs 12,500. The appeal is to this extent allowed and the case will be remitted to the High Court for a revised decree being passed on the above footing. The plaintiffs will be entitled to the costs awarded to them by the decrees of the High Court and the Trial Court. There will be no order as to the costs of this appeal

Gwyer, C.J.—I agree.

K. S *Appeal allowed in part.*

[Appellate Jurisdiction.]

PRESENT:—SIR MAURICE GWYER, C.J., SIR SHAH SULAIMAN AND SIR S. VARADACHARIAR, JJ.

ON APPEAL FROM THE HIGH COURT AT PATNA.

Subhanand Chowdhary and Another .. *Appellants**

v.

Apurba Krishna Mitra and Another .. *Respondents.*

Government of India Act (1935), S. 205—Certificate that case involved a question as to constitutional validity of a provincial enactment—Subsequent repeal and re-enactment of the Act with Governor-General's sanction—Effect on the certificate and the jurisdiction of the Federal Court to hear the appeal—Civil Procedure Code (V of 1908), Ss. 151 and 152—If certificate can be vacated under—Jurisdiction to entertain appeal on grounds other than those covered by certificate.

The plaintiff on appeal before the High Court successfully impugned the constitutional validity of S. 11 of the Bihar Money Lenders Act, 1938 The defendant obtained a certificate under S. 205 (1) of the Constitution Act. The date of the High Court judgment and the certificate was 17th January, 1939. On 1st May, 1939, the Bihar Money Lenders (Regulation of Transactions) Act (VII of 1939), came into force after it had received the assent of the Governor-General. It was contended that by reason of the new Act, coming into force, the certificate had become infructuous and ineffective. It was also suggested that the High Court had power in appropriate circumstances to vacate a certificate under Ss. 151 or 152 of the Civil Procedure Code.

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*Case No. 13 of 1939. March 18, 1940.

Held, S. 152 of the Code, had no application to the present case and there can be no inherent power to alter a decree or certificate, which was correct at the time when it was made or given because of the happening of some subsequent event. If the High Court has no power to vacate its certificate the Federal Court has certainly no power to do so.

When jurisdiction to hear an appeal is once vested in the Federal Court by the grant of a certificate, it cannot be divested by any subsequent event. Once certificate has been granted an appellant can appeal on any ground whatsoever if the Court thinks fit to give him leave to do so. Jurisdiction to entertain the appeal on other grounds would not be excluded even if the appellant declined to argue that decision of High Court on the constitutional question with respect to which the certificate had been granted was wrong.

B. B. Tawakley with *Major Surendropal Singh* instructed by *T. K. Prasad,* Agent, for the Appellants.

Sir Brojendra Mitter with *Raghbir Singh,* instructed by *B. Banerji,* Agent, for Respondent No. 1, Respondent No. 2 not represented.

JUDGMENT—In this case the facts do not differ materially from others which have come before us lately from Bihar; but the Advocate-General of India, on behalf of the respondents, has raised a novel and interesting point.

The plaintiff (the present first respondent) obtained a decree in the Court of the Subordinate Judge, Muzaffarpur, and the decree (with certain modifications in their favour) has been upheld in the High Court. The defendants' claim to have the benefit of S. 11 of the Bihar Money-lenders Act, 1938, was rejected, since that provision had already been held by the High Court to be void *Sadanand Jha* v. *Aman Khan*[1]; but the High Court granted a certificate under S. 205 (1) of the Constitution Act.

The date of the judgment of the High Court and of their certificate was 17th January, 1939. On 1st May, 1939, the Bihar Money-lenders (Regulation of Transactions) Act, 1939 (Act VII of 1939), came into force. The application of the appellants to the High Court for admission of their appeal to the Federal Court was made on the 11th May, and the appeal was finally admitted by the High Court on the 2nd October last. The Act of 1939, which has been before this Court in several cases during the present sittings, repealed and re-enacted S. 11 of the Bihar Money-lenders Act, 1938, and since it had been reserved for the consideration of the Governor-General and had received his assent, its validity cannot be challenged as that of the Act of 1938, had been.

Such are the facts of the case, and the Advocate-General admitted that, if the appeal were properly constituted, the appellants would be entitled to the benefit of the Act of 1939; but he contended that there was no appeal properly before the Court. He put his argument in this way. The certificate under S. 205 (1), granted on 17th January, certified that the case involved a substantial question of law as to the interpretation of the Constitution Act, that question being (or so it is to be presumed, for the certificate does not mention any particular question of law) whether S. 11 of the Bihar Money-lenders Act, 1938, was, as the High Court had held in their earlier decision, void under S. 107 of the Constitution Act,

1. (1939) I.L.R. 18 Pat. 13 (F.B.).

because repugnant to an existing Indian law, *viz.*, S. 2 of the Usuary Laws Repeal Act, 1855, S. 3 of the Usurious Loans Act, 1918, and possibly also S. 37 of the Contract Act, 1872. The Advocate-General admitted that on the day when this certificate was granted it was a good and valid certificate, and that the appellants were entitled at that time to appeal to this Court not only on the question as to the validity of S. 11 of the Act of 1938, but also on any other ground mentioned in S. 205 (2) of the Constitution Act. But, he said, the question of law as to the validity of S. 11 ceased to exist at the beginning of May, when the new Act of 1939, came into force; and, since the Act was retrospective, the certificate had become, to use his own expression, "infructuous" and ineffective. Accordingly, he argued that this Court had no longer jurisdiction to hear the appeal, either on the constitutional, or on any other ground, since an effective certificate alone is the foundation of the Court's jurisdiction; and that the appellants must seek their remedy, if any, before the Judicial Committee. He also pointed out that the object of the appeal now is to obtain the benefit of the Act of 1939, that is to say, of a law which was not yet in existence when the certificate was granted by the High Court.

S. 205 of the Constitution Act is in the following terms:—

"205.—(1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.

(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave."

The granting of a certificate is thus the necessary condition precedent to the exercise of its jurisdiction by this Court; and it sets in motion a train of consequences. No provision is made for the cancellation or vacating of a certificate after it has once been granted. The Advocate-General did indeed suggest that the High Court had power in appropriate circumstances to vacate a certificate under S. 151 or S. 152 of the Code of Civil Procedure. He abandoned the suggestion however before the conclusion of his argument, and in our opinion he was prudent to do so. Plainly S. 152 of the Code has no application to such a case as the present, and there can be no inherent power to alter a decree or certificate, which was correct at the time when it was made or given, because of the happening of some subsequent event.

If the High Court had no power to vacate its certificate, this Court has certainly no power to do so. Can it then treat an existing certificate as having become "infructuous", because the constitutional question with respect to which it was given subsequently becomes of no more than academic interest? The Advocate-General referred to the observations of the Judicial Committee in *Attorney-General for Alberta* v. *Attorney-General for Canada*,[1] where the Lord Chancellor stated that it was the practice of the

1. (1939) A.C. 117 at 122, 128.

Committee not to entertain appeals which have no relation to existing rights created or purported to be created or to express opinions on subjects which are no longer of any practical interest. In our opinion it would be convenient for this Court to follow the same practice; and we have in an earlier case declined to hear arguments on the validity of the repealed Bihar Act of 1938. But we are not now considering the convenience or otherwise of a particular practice; we are considering a question of jurisdiction. The certificate granted by the High Court on 17th January, 1939, admittedly conferred jurisdiction on this Court to hear the appeal; and we have to determine whether that jurisdiction has been taken away from us, by reason of the alteration of circumstances. In our opinion, when jurisdicton to hear an appeal is once vested in this Court by the grant of a certificate, it cannot be divested by any subsequent event. A certificate is the key which unlocks the door into this Court, and a litigant who has once passed through that door cannot afterwards be ejected by the happening of events outside and beyond his control. It seems to us quite immaterial that the relief which the appellants now claim arises from an Act, which was not law when the certificate was granted. S. 205 (2) is plain; and once a certificate has been granted, an appellant can appeal on any ground whatsoever, if the Court thinks fit to give him, leave to do so. Nor do we think, though it is not necessary to decide the point, that the jurisdiction of this Court to entertain the appeal on those other grounds would be excluded, even if an appellant declined to argue before us that the decision of the High Court on the constitutional question with respect to which the certficate had been granted was wrong.

It is sufficient for us to base our judgment on what we conceive to be the true construction of S. 205 of the Constitution Act, and we do not think it necessary to decide whether the appellants had also a vested right under the Act of 1938, which was saved to them by S. 8 of the Bihar General Clauses Act, notwithstanding the repeal of the Act of 1938, by the Act of 1939.

The facts in the present case are unusual and are unlikely to recur. We do not suppose that Parliament ever contemplated a contingency of the kind; but that is no reason why we should not give effect to the plain language of the Act. Nor could we lightly adopt a construction which would have this result, that an appeal properly begun and continued in this Court was suddenly, by the action of a Provincial Legislature, taken out of our jurisdiction and transferred to the jurisdiction of the Judicial Committee.

In our opinion therefore this Court has jurisdiction to entertain the appeal. The appellants' counsel did not argue any grounds of appeal other than the application of the Bihar Act of 1939, and, as we have already said, the Advocate-General of India, on behalf of the respondents, admitted that, if the appeal were properly constituted and this Court had jurisdiction, the appellants were entitled to the benefit of the Act. We accordingly allow the appeal to the extent of reducing the interest payable to the plaintiff up to the date of the institution of the suit to Rs. 8,500 in respect of the first mortgage bond, Exhibit I, and to Rs. 3,995 in respect of the second bond,

Exhibit I (*a*). As regards interest *pendente lite,* this is governed in the case of mortgage actions by O. XXXIV, r. 11, of the Code of Civil Procedure, which provides that the Court "may" order payment of interest, up to the date on or before which payment of the amount found due is under the preliminary decree to be made by the mortgagor, at the rate payable on the principal, or where no such rate is fixed at such rate as the Court may deem reasonable; and it is to be observed that though this provision has found a place in the Code since 1929, S. 7 of the Bihar Act of 1939, is expressly limited to interest claimable up to the date of the institution of the suit. The Act has maintained a distinction between loans advanced before the Act and loans advanced subsequently; as regards the latter it has limited the rate of interest (S. 5) and has also prohibited compound interest (S. 6), while as regards the former it has only limited the aggregate amount of interest payable up to the date of the institution of the suit (S. 7). The contract for the payment of interest thus not having been declared illegal, but only unenforceable beyond a certain point, the creditor retains his contractual rights except to the extent to which the statute has expressly limited them. In these circumstances, it may perhaps be open to doubt whether the policy of the Bihar legislation can properly be taken into account by a Court which is considering whether there are any grounds for reducing the rate of interest to which a mortgagee would ordinarily be entitled under the provisions of O. XXXIV, r. 11 of the Code, since this would in effect be to extend the Act to a period with which the Legislature has not chosen to deal; but it may be that the wide powers of reopening transactions originating before or after the commencement of the Act, given to the Court by S. 8 of the Bihar Act of 1939, were regarded by the Legislature as conferring a much wider discretion than that given by O. XXXIV, r. 11, or by the Usurious Loans Act, 1918. Having regard to all the circumstances, we think that the justice of the case will be met by allowing the plaintiff (respondent) simple interest at 12 per cent. per annum rather than the 12 per cent. compound interest with yearly rests specified in the contract, in respect of the principal amount due on both the bonds from 20th December, 1934, to the date fixed for payment in the revised decree to be passed by the High Court. From the latter date the aggregate amount due for principal, interest and costs will carry interest at 6 per cent. per annum till the date of realisation or payment.

The case will be remitted to the High Court with a direction to discharge their order dated 17th January, 1939, and the order of the Subordinate Judge dated 2nd March, 1936, and to pass a decree in the terms above stated. The respondents will retain the costs already awarded to them in the High Court and in the Court below; there will be no order as to costs in this Court.

K. S. *Appeal allowed.*

[Appellate Jurisdiction.]

PRESENT:—SIR MAURICE GWYER, C.J, SIR SHAH SULAIMAN AND SIR S. VARADACHARIAR, JJ.

ON APPEAL FROM THE HIGH COURT AT PATNA.

Raja Prithwi Chand Lall Chowdhry .. *Appellants**

v.

Rai Bahadur Sukhraj Rai and Others .. *Respondents.*

Practice—Appeal to Federal Court—Certificate under Government of India Act (1935), *S.* 205 (1)—*Necessity for, before an application to High Court under Civil Procedure Code* (*V of* 1908), *O. XLV can be made for admission of appeal to Federal Court—Obligation of members of the Bar not to make unreliable statements of fact based on surmises or guesses.*

Where the certificate under the Government of India Act (1935), S. 205 (1) is not in existence an application to the High Court under O. XLV of the Civil Procedure Code is quite irregular. It may be that where a certificate had not been granted at the time the judgment was pronounced, the party interested might bring the matter to the notice of the Court by an application, but that will not be an applica-cation under O. XLV.

Impropriety of counsel making to the Court statements of fact which turn out to be based on surmises or guesses pointed out.

Rajeshwari Prasad, Raghbir Singh, A. C S. Chari and *A H Fakhruddin,* instructed by *G Sahay,* Agent, for the Appellant.

Krip Narain with *Radha Mohan Lal,* instructed by *Tarachand Brijmohanlal,* Agent, for the Respondents.

JUDGMENT.—This appeal must be dismissed. It appears that in the proceedings before the High Court the point which the counsel for the appellant now seeks to raise was never mentioned and it is not clear on what grounds the certificate under S. 205 of the Constitution Act was obtained from the High Court. The application made under O. XLV of the Civil Procedure Code to the High Court was quite irregular, because r. 17, which has been added to O XLV by the Government of India (Adaptation of Indian Laws) Order, 1937, assumes that a certificate under S 205 of the Constitution Act has already been given. No such certificate was in existence when the application was made. It may be that where a certificate had not been granted at the time the judgment was pronounced, the party interested might bring the matter to the notice of the Court by an application, but that will not be an application under O. XLV. We do not know what question of interpretation of the Constitution Act was in the opinion of the High Court involved in the case and the record throws no light upon the point

Counsel for the appellant told us that the only point which he desired to argue was the application of S. 8 of the new Bihar Act of 1939 (Act VII of 1939). It is the first time in any Court that the appellant has sought to make such a submission, either under S. 8 of the Act of 1939 or under the corresponding section of the earlier Act of 1938. In his petition of

*Case No. 15 of 1939. 18th March, 1940.

appeal he does not even refer to that section, but to different sections altogether. We were told that this was a printer's error, but we have seen a typescript copy of the petition, with references to those sections inserted in manuscript and initialled by the appellant's agent We were asked to allow the petition to be amended, but in the circumstances we see no reason for allowing any amendment; and even if we had done so, we should certainly have rejected a request that we should exercise for the first time a discretion which the High Court could have been, but was not, asked to exercise under S. 12 of the earlier Act, a section which, so far as we are aware, the High Court has not at any time held to be void, as it has held other sections of the same Act to be.

We have one other observation to make. Counsel for the appellant, in answer to questions put to him by the Court, made what purported to be statements of fact relating to matters arising out of the litigation, which on further enquiry were found to be no more than surmises or guesses on his part When counsel take on themselves the responsibility of making statements of fact to the Court, the Court is entitled to assume that those statements are true in every particular, so that it may implicitly rely upon them This is a rule which admits of no qualification. It is an honourable obligation of the Bar and of great value in the administration of justice; and we trust that we shall not have occasion to draw attention to it again.

The appeal is dismissed with costs.

K. S. *Appeal dismissed.*